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Supreme Court of the United States

OCTOBER TERM, 1957

No. 64

NATIONAL LABOR RELATIONS BOARD,
PETITIONER,

vs.

DISTRICT 50, UNITED MINE WORKERS OF AMERICA AND BOWMAN TRANSPORTATION, INC.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Petition for Certiorari
Filed January 2, 1957
Certiorari Granted February 25, 1957

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1957

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PETITIONER,

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DISTRICT 50, UNITED MINE WORKERS OF AMERICA AND BOWMAN TRANSPORTATION, INC.

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IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 12,887

DISTRICT 50, UNITED MINE WORKERS OF AMERICA, *Petitioner*

v.

NATIONAL LABOR RELATIONS BOARD, *Respondent.*

No. 12,950

NATIONAL LABOR RELATIONS BOARD, *Petitioner,*

v.

BOWMAN TRANSPORTATION, INC., *Respondent.*

On Petition for Review of Original and Supplemental Order of the National Labor Relations Board

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Joint Appendix—Filed February 15, 1956

Volume I

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

Stipulation—Filed November 29, 1955

It is hereby stipulated by and between the parties to the above-entitled cases:

* * * * * * * * * * *

3. That the following questions are presented in this proceeding:

a. Whether substantial evidence on the record as a whole supports the findings of the Board that Bowman Transportation, Inc.—

(1) Violated Section 8 (a) (1) of the National Labor Relations Act, as amended, by interrogating its employees concerning their union activities, and by engaging in surveillance of its employees with respect to such activities;

(2) Violated Section 8 (a) (3) and (1) of the Act by discriminating against employees Welch Gross and Joe Lackey because of their union activities;

(3) Violated Section 8 (a) (2) and (1) of the Act by assisting or contributing support to District 50.

b. Whether the Order of the Board directing Bowman Transportation, Inc. to withhold recognition from District 50 unless and until that organization is certified by the Board as representative of Bowman's employees, is a proper and lawful order.

11 c. Whether, under Section 10 (e) of the Act, the Court should consider question "b" inasmuch as it was not raised by any exception to the Intermediate Report.

MAURICE F. BISHOP
Counsel for Bowman Transportation, Inc.

E. CRAMPTON HARRIS
Counsel for District 50,
United Mine Workers of America

MARCEL MALLET-PREVOST
Assistant General Counsel,
National Labor Relations Board

Washington, D. C.,
November 14, 1955

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IR-583
Gadsden, Ala.

BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF TRIAL EXAMINERS
WASHINGTON, D. C.

Case Nos. 10-CA-1950, 10-CA-1985

BOWMAN TRANSPORTATION, INC.

and

INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA, AFL, LOCAL No. 612

Mr. Edwin R. Hancock, of Atlanta, Ga., for the General Counsel.

Mr. Maurice F. Bishop, of Birmingham, Ala, for the Respondent.

Mr. George C. Hawkins, of Gadsden, Ala., for the Charging Union.

Before: Robert E. Mullin, Trial Examiner.

Intermediate Report—Filed November 26, 1954

STATEMENT OF THE CASE

This proceeding, brought under Section 10 (b) of the National Labor Relations Act, as amended, 61 Stat. 136 (herein called the Act), was heard in Gadsden, Alabama, from August 3 to August 5, 1954, inclusive, pursuant to an order of consolidation and due notice to all
676 parties.[1] The complaint in Case No. 1950, based on charges duly filed and served, alleged that the Respondent had engaged in unfair labor practices within the meaning of Section 8 (a) (1) and (3) of the Act by discriminatorily discharging one employee on November 22, 1953, threatening another with reprisals, and engaging in surveillance. In Case No. 1985, the complaint alleged that in May 1954, the Respondent, in violation of Section

[1] The General Counsel and the staff attorney appearing for him at the hearing are referred to herein as the General Counsel and the National Labor Relations Board as the Board. The above-named Company is referred to as the Respondent, and the Charging Party, likewise named above, as the Union or Teamsters.

8 (a) (1) and (2) of the Act, bargained and agreed upon the terms of a contract with District 50, United Mine Workers of America (herein called District 50) at a time when it did not represent a majority of the Respondent's employees and by various other acts and conduct assisted and supported that union. In its answers, the Respondent conceded certain facts with respect to its business operations but denied the commission of any unfair labor practices.

The General Counsel, the Respondent and the Teamsters were represented at the hearing by their attorneys. Full opportunity to be heard, to examine and cross-examine witnesses, and to introduce all evidence pertinent to the issues was afforded all parties. The parties waived oral argument. Subsequent to the hearing a brief was received from the General Counsel.

Upon the entire record in the case, and from my observation of the demeanor of the witnesses, I make the following:

FINDINGS OF FACT

I. The Business of the Respondent

Respondent, an Alabama corporation, is a common carrier engaged in the transportation of freight by motor vehicles. In the conduct of its business the Respondent operates throughout the southeastern States and maintains terminals at Gadsden, Anniston, and Birmingham, Alabama at Memphis and Chattanooga, Tennessee, at Atlanta, Georgia, and at Richmond, Virginia. During all times material herein the dollar volume of the Respondent's annual business exceeded $2,500,000, 98 percent of which was derived from the interstate transportation of freight. The Respondent concedes, and I find, that it is engaged in commerce within the meaning of Section 2 (6) and (7) of the Act.

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II. The Labor Organizations Involved

The Teamsters and District 50 are labor organizations within the meaning of Section 2 (5) of the Act.

III. The Unfair Labor Practices

A. *Sequence of Events*

The Teamsters began an organizational campaign among Respondent's employees in November 1953. On November 22, the Respondent discharged Welch Gross, an issue herein. On November 23, the Union placed a picket line outside the entrance to the Company's Gadsden terminal. A considerable number of the employees then left their jobs and joined in the picketing which continued until December 28, when the Circuit Court of Etowah County, Alabama, issued a temporary restraining order. The Court's decree and various amendments thereto enjoined all picketing until May 17, 1954, when the Court removed its ban on peaceful picketing but made permanent that portion of its decree which forbade violence and misconduct on the picket line. Subsequent to that date the Union resumed its picketing of the Respondent's premises. At the time of the hearing this picketing was still in progress.

On May 22, after some of the employees had told Ralph M. Bowman, president of the Respondent, that they wanted a contract, and after several meetings with organizers for District 50, Bowman called all his drivers in for a
678 special meeting. After a poll of those present in which a majority signified that they wanted District 50 to represent them, Bowman withdrew from the meeting. Later in the day he met with representatives of District 50 and signed a contract which, along with various other provisions, provided for union security and a checkoff of the employees' union dues.

B. *Case No. 1950, the Allegations, the Evidence and Conclusions With Respect Thereto*

The General Counsel alleged that the Respondent engaged in surveillance of a Teamsters' meeting, discriminatorily took Joe Lackey, one of its drivers, off his regular run and discriminatorily dismissed Welch Gross, another driver. These allegations were denied by the Respondent in their entirety.

Organizational activities among the Respondent's employees began early in November and on about November 14, Carl Renfroe, assistant business agent for the Team-

sters, met with several of the drivers. On November 21, a second meeting was held, at which about 20 employees were present. Among those in attendance were Joe Lackey and Welch Gross. About 30 minutes after the conclusion of the meeting and while some 8 to 10 employees were still gathered at the site, both Ralph M. Bowman and Donald B. Lockridge, president and vice president, respectively, of the Respondent, appeared, greeted those present in a casual manner and then departed.

The following morning, while some 15 to 20 drivers were gathered at the terminal, Mr. Bowman spoke to several of the men. According to Lackey, the company president said to him "Joe, you are the biggest liar of all. You promised me before when we had this labor trouble
679 here that you'd never be mixed up in this Union no more." Lackey further testified that Bowman then told him that his vacation was over and from that point forward he would have to take runs as the other drivers did.[2] Bowman then asked if Lackey would refuse another trip and the latter told him he would accept anything offered. Bowman thereupon spoke to Welch Gross and told him he was being discharged for "tearing up my trailer." After making this statement the company president turned to William Moon, another driver, and declared "You, of all guys, I can't see why that you would do me this way after what I've done for you."[3] To J. P. Jordan, another driver in the group, he stated "Take Brother Jordan, he is trying to play both ends and the middle . . . he's told around over here that he has . . . a friend in the office . . . as of now he doesn't have any."[4]

The following day, M. R. Sherman, business agent for the Teamsters, endeavored to meet with Bowman. After

[2] Lackey's testimony in this connection was corroborated by J. P. Jordan and Herschel White. Bowman denied having mentioned the Union on this occasion but he conceded that he called Lackey a liar. In view of the extensive corroboration in the record for Lackey's version of this conversation, I credit his testimony in this regard rather than that of the company president.

[3] Bowman had paid for an extended hospitalization that Moon experienced sometime before. At the hearing he testified that he understood the men at the Burns Park site were gambling when he had seen them and that his concern for Moon had risen from the fact that he felt that it was ill-advised for anyone in Moon's straits to be gambling.

[4] Bowman testified that he told Jordan he understood Jordan had a friend in the office.

making several attempts to reach him by telephone, Sherman went to the terminal. There, Bowman's secretary told him that the company president was too busy to see him. Late that afternoon the Teamsters established a picket line before the Respondent's Gadsden headquarters.

1. Surveillance

The General Counsel's allegations that the Respondent's officials engaged in surveillance of the union meeting on November 21 was denied by the Respondent. The latter conceded, however, that Bowman and Lockridge had visited the site of the meeting. Both of these officials testified that they had done so merely out of curiosity, that they had no knowledge either before or after their visit that a union meeting was in progress or had been held at the scene and that the only employee who spoke to them while there told them that the men were "shooting craps."

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The union gathering assembled at Burns Park, a site within the city limits of Gadsden but in a somewhat isolated area, three quarters of a mile off a main highway and at the dead end of an unpaved road. Apart from a water tower, near which the meeting was held, there are no buildings or structures of any kind in the immediate vicinity. It is one and one-half miles from the Respondent's place of business.

The explanation offered by Bowman and Lockridge for their presence at this out-of-the-way location coincidentally with the Teamsters' meeting might be acceptable were it not for other testimony in the transcript. Thus, Jordan testified that early on the afternoon of November 21, Lockridge, whom he had known for 30 years, drove up to his home, initiated a conversation about the Union and questioned him as to where the meeting was to be held that afternoon. When Jordan declined to discuss the matter, Lockridge departed.[5] The following morning, when Jordan

[5] The foregoing findings are based on the testimony of Jordan. Lockridge denied this account in its entirety and testified that he had never visited Jordan at his home. The latter, however, was corroborated by two neighbors, Cecil Horsley and Jake Parker, who credibly testified that they recalled having seen Lockridge drive up to Jordan's house on the day in question. The testimony of these last named was most persuasive and withstood a searching cross-examination. Lockridge's denial, on the other hand, was unconvincing. Accordingly, I credit the testimony of Jordan.

arrived at the terminal, Lockridge called him into his office and stated that he wanted to know about the Union
681. that had been stirred up. When the employee denied any knowledge of the matter, Lockridge told him that he already knew who the ringleaders were and then cautioned Jordan not to lie about his answers or he would be in trouble.[6] That same morning in the presence of Lockridge, Bowman told Jesse Blackburn, one of the drivers who had been at Burns Park the day before, that he wanted to know what had transpired at the meeting behind the water tank. When Blackburn suggested that it was improper for a company official to have been there, Bowman told him he was "just looking around."[7]

In view of Lockridge's attempt on November 21 to learn the location of the union meeting and the subsequent interrogation of two of the drivers by both Lockridge and Bowman on the subject matter of that meeting and the extent of employee organization, the presence of these officials at the isolated site where the union gathering was held can not be dismissed as a mere coincidence. It is my conclusion and, I find, that, at the time, they were engaged in unlawful surveillance of the employees' union activities and that by reason of such conduct the Respondent violated Section 8 (a) (1) of the Act.

2. The alleged discrimination as to Lackey

Lackey was among the first to become active in the Teamsters' campaign and attended both of the organizational meetings. On November 21, he was among the group of drivers to whom Bowman spoke when visiting Burns Park that day. The following morning the company president, as found above, chided Lackey for having anything to do with the Union, announced that henceforward
682 he would have to take any assignment available, and then offered him a run to Warner Robbins Air Force Base in Georgia. Lackey accepted this assignment, but had no others subsequent to that time for, upon completing this

[6] This was denied by Lockridge. His denial in this connection, however, was no more convincing than his disavowal referred to in the preceding footnote.

[7] The findings as to this incident are based on the credit testimony of Blackburn, which, in this regard, was undenied.

trip, he joined in the picketing which the Teamsters initiated at the Respondent's premises on November 23.

The General Counsel contends that for a lengthy period prior to November 22, the Respondent frequently assigned Lackey to its Gadsden-Decatur run in order that Lackey, whose wife was suffering from a prolonged illness, would not be compelled to remain away from home overnight, that on November 22, when Bowman announced that he was rescinding this practice it was because of Lackey's union activities, and therefore discriminatory.

The employee testified that about 2 years prior to November 22 he had told Bowman that because of his wife's illness he would prefer not to drive any runs which would keep him away from home overnight. According to Lackey, thereafter he sometimes made trips to other points besides Decatur, but more frequently he was assigned to the Gadsden-Decatur run which could be completed in a single day and thus enable him to be home at night. This testimony was corroborated by an exhibit received at the hearing which revealed that out of approximately 142 of his dispatches, 122 were to Decatur, Alabama. During the period covered by this exhibit Lackey completed all runs to Decatur in a single day and was away from Gadsden during his other trips on approximately 5 different nights. In support of its position that there was no discrimination or threat of discrimination in the case of this employee, the Respondent offered some testimony to the effect that as an irregular route carrier it had no set runs and that none of its drivers was assigned to any
683 specific route. On the other hand, Fred Marler, the Respondent's dispatcher and its principal witness on this issue, conceded that for several months prior to November 22 he had made an effort to give Lackey the Decatur runs "because his wife was in ill health and he wanted to stay as close to home as possible to be with his wife."[8] Even Bowman corroborated this testimony. Rather significantly, the Respondent offered no evidence that during the preceding two years any driver other than Lackey had been dispatched on a trip from Gadsden to Decatur.

On the foregoing facts it is plain that for a considerable period prior to November 22 the Respondent endeavored

[8] The quotation is from Marler's testimony.

to give Lackey a specific assignment that worked to his personal advantage. It is equally clear that when Bowman told him "your vacation is over" and that he would have to accept runs as did the other drivers that this favorable arrangement was threatened, if not at an end. Since Bowman prefaced this announcement by describing Lackey as a "liar" and deriding him for having gone back on a promise "never to be mixed up in this Union no more," it is my conclusion, and I find, that, in making his statement that the arrangement as to Lackey's assignments was being terminated, Bowman was motivated by his discovery on the preceding afternoon that this employee was actively supporting the Teamsters. In view of the fact that the threat to lose or the actual loss of such a preference as Lackey enjoyed at that particular time would seriously affect his working conditions, and the tenure of his employment, Bowman's announcement was coercive and a violation of Section 8 (a) (3) and (1).

3. Welch Gross

At the time of his discharge, Gross had been an over-the-road driver for approximately 11 months. He
684 first attended a union meeting on November 21 and at that time signed a card authorizing the Teamsters to represent him. Gross was dismissed on November 22, as mentioned earlier, when President Bowman told him he was "fired for tearing up my trailer." In its answer, the Respondent offered two additional reasons for Gross' termination, viz., failure to file an accident report and falsification of his daily logs. At the hearing, Bowman testified that he discharged Gross for all three of these reasons.

Gross had had an accident on or about October 26 in which his trailer was damaged. On returning to the terminal he told Marler, the dispatcher, and Rufus Thacker, the dock foreman, about having had an accident and that he was willing to pay for the damage. The latter suggested that he see Bowman about the matter. This much of Gross' testimony was corroborated by Marler. The latter also testified that he told Gross to make out an accident report and talk to Mr. Bowman about it. Gross credibly testified that no one ever asked him to prepare and file such a report. Pursuant to an order from his

superiors, on about November 12, Gross pulled the trailer to a maintenance shop in Birmingham where it was repaired at a cost of approximately $280.

It was undisputed that on the morning of November 21, Bowman held a meeting with the drivers at which he expressed concern at the number of recent accidents, and declared that apparently it would be necessary to make the drivers pay for their damages in order to cut the accident rate. After the meeting Gross followed Bowman into his office. According to the employee, at this time he told the company president that he would like to pay some more on the trailer because he did not feel
685 that he had paid enough,[9] that Bowman told him that this would be satisfactory and that Gross should make arrangements for doing so with Rufus Thacker, the dock foreman. Gross further testified that after leaving Bowman's office he reported this conversation to Thacker and discussed with him an arrangement whereby the Company would deduct a regular amount from each check until the repair bill was satisfied.[10]

Bowman's version of this conversation was somewhat different. According to the latter, Gross followed him into his office, remarked, "I guess that meeting was held for my benefit," and stated that he wanted to pay for the damage to the trailer. Bowman testified that he told the employee the damage should have been paid for before then and that he concluded the meeting with the statement that he would look into the matter and inform Gross of his decision later.[11] According to Bowman, after Gross left his office, at about noon on November 21, he requested Frank Wofford, secretary-treasurer of the Company and the one in charge of the business records, to bring him Gross' file. Bowman testified that this was the first op-

[9] Gross testified that earlier a fellow employee reported a conversation between Marler and Bowman which led him to believe that his liability for the trailer damage would be satisfied by his not getting paid for the trip to Birmingham. Both Bowman and Marler denied that there was any basis for such an assumption. On the other hand, Gross was not paid for his Birmingham run in the normal course of events. Not until February 4, 1954, some 10 weeks after his discharge, did he receive a check for the mileage driven on this trip. The Respondent offer no explanation for this long delay.

[10] The Respondent never called Thacker as a witness.

[11] Gross testified that, insofar as he could recall, Bowman said nothing about withholding a decision on the matter until a later date.

portunity he had had to examine Gross' record and that on doing so he discovered that the driver had never filed an insurance report on the accident to the trailer, and, further, that on comparing the insurance observation reports[12] in Gross' file with the logs which he had sub-
686 mitted on these dates it was immediately apparent that Gross had falsified certain of his logs. According to the company president, at that point he decided to fire the employee. Bowman's testimony about examining the company file on Gross was not contradicted and it was corroborated by Wofford.

Plainly, the Company had a well-established rule that all accidents had to be reported to the company office. If the damage exceeded $100, a report had to be filed with the insurance carrier and with the Interstate Commerce Commission. From the record, however, it does not appear that the driver himself had to file any written memorandum to satisfy the reporting requirement. Bowman testified that drivers have "to report [accidents] to the office as soon as they come in" and that if the damage exceeds $100 a report is filed with the Interstate Commerce Commission. None of the Respondent's witnesses testified that the driver was required to file a written report of an accident in any specific manner and no forms for such reporting were offered in evidence. For this reason and from the testimony of Mr. Bowman it is my conclusion that the driver make an oral report to a responsible supervisor or official in time for the latter to notify the insurance company and to prepare the requisite memorandum for the Interstate Commerce Commission.[13] On this basis Gross had satisfied the requirement, for his testimony about having reported orally to Marler on the accident was confirmed by the dispatcher while the latter was on the stand.

There was much testimony as to the responsibility of the individual driver for keeping an accurate daily
687 log. Several of the company witnesses testified that, in compliance with the regulations of the Interstate

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[12] These were submitted to the Company at frequent intervals by the patrols which its insurance carrier provided.

[13] See also, ICC, Motor Carrier Safety Regulations (1952), pp. 48-50 wherein the responsibility for filing such reports with the Commission is placed on the motor carrier rather than the driver.

Commerce Commission,[14] no employee was permitted to drive in excess of 10 hours per day or 60 hours per week, that each driver was required to keep an accurate daily log of the hours driven, and that the penalty for falsification of his log was discharge. On the other hand, Marler could recall no case other than Gross' in which this penalty had been imposed. Bowman testified that, in addition to Gross, one William Hyatt was discharged "partly" for falsifying his log.[15] There was testimony from certain Witnesses[16] produced by the General Counsel which would tend to prove that some of the drivers not infrequently exceeded the 10-hour limit without reprimand. However, the record contains no convincing evidence that the company officials were either aware of those particular infractions of the 10-hour rule about which some of the witnesses at the hearing testified or that they tacitly condoned the practice.

At the hearing the Respondent offered in evidence 4 driving reports made on Gross by the insurance carrier which indicated that the employee's daily logs submitted on the 4 separate days covered by those reports were false. Gross admitted that the logs in question were inaccurate and that they did not reflect his actual driving time. He also conceded that no company official had instructed him to falsify his logs.

688 According to Bowman he reached his decision to discharge Gross on November 21, without knowledge of any kind of the employee's union interests. He further testified that he had not seen Gross at Burns Park when he and Lockridge visited that point later in the day. This latter testimony, however, is quite implausible for at the time only 8 to 10 employees were in the area and Gross and Lackey were seated together in the same car. In

[14] Ibid. pp. 50-56.

[15] Hyatt was called by the General Counsel in rebuttal and testified that he had never been told that log falsification had anything to do with his discharge. Bowman testified that at the time of the discharge he told Hyatt that he was fired for going to sleep at the wheel and for "running over his hours." Nevertheless, only a short while thereafter Bowman rehired Hyatt and kept him as an employee despite two subsequent accidents in which Hyatt was involved. One of these occurred only a few months before Gross' discharge and was was an accident of almost the same nature as Gross had had. Hyatt however, was neither dismissed because of it nor did he have to pay for the damage incurred.

[16] Blackburn and Jordan.

view of Bowman's comments to Lackey the next day, related earlier herein, it is plain that he had noted the presence of that employee at the meeting site the preceding afternoon.[17] Consequently, it seems reasonable to conclude, as I do, that on the same occasion Bowman also saw Gross.

If Mr. Bowman's testimony is accepted, then it would appear that he arrived at his decision to fire Gross at about noon on November 21, when the Respondent could not have known about the latter's union activity, immediately upon discovering that the employee had inaccurate logs in his file and had never made out an accident report. For a number of reasons I am forced to the conclusion that Mr. Bowman's testimony cannot be credited.[18] Foremost among these was a reaction gathered by the Examiner from the demeanor and bearing of this witness. Then, too, there is the fact that, despite Bowman's statement that he decided upon Gross' dismissal because
689 of his concern about the employee's misleading logs and the lack of an accident report in the file, at the time when Gross was actually dismissed, Bowman never mentioned these alleged reasons. Instead, he declared only that the employee was being discharged because of the accident involving the trailer. Had Bowman decided upon this action as a disciplinary warning to the other drivers that accurate logs and accident reports were a necessity it seems strange indeed that the company president did not so state to the assembled employees on the morning of November 22. Instead he began his remarks by denouncing Lackey, Moon and Jordan for their union activities and declaring that Lackey's domestic problems would no longer be considered in that employee's future assignments. Almost in the same breath he declared that Gross was fired for damaging his trailer. In addition to the

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[17] Lockridge testified that he and Bowman "spoke to all of [the employees] when we walked up there."

[18] Although Mr. Bowman testified that he decided upon Gross' discharge at this time, there is no evidence that he expressed this intention to anyone until the following morning when he notified Gross. As an uncommunicated intention, therefore, his testimony as to the moment he arrived at this decision was hardly susceptible to cross-examination. Even if it be assumed that this testimony was not controverted by Bowman's subsequent conduct and that it was uncontradicted, that in itself does not compel its acceptance. N. L. R. B. v. Howell Chevrolet Co., 204 F. 2d 79, 86 (C. A. 9), affirmed 346 U. S. 482; N. L. R. B. v. Dinion Coil, Inc., 210 F. 2d 484, 486-487 (C A 2).

foregoing evidence of Bowman's grave displeasure regarding the employees' interest in a union, as found earlier, at about the same time that Bowman was allegedly checking Gross's file, Lockridge, his vice president, was contacting Jordan to discover, if possible, where the union meeting was to be held. Later that day he and Bowman searched for, and found, the site of the organizational meeting where Lackey, Gross and other employees were observed. Not until the Respondent filed its answer to the complaint in Case No. 10-CA-1950 did it allege that Gross was discharged for falsification of his logs and failure to report the accident. Despite Mr. Bowman's testimony at the hearing that these were among the reasons for Gross' dismissal, he did not testify that he had ever so informed the employee. Nor did the Respondent offer any independent evidence that would tend to prove Mr. Bowman's self-serving declaration as to the moment he decided to fire Gross. Plainly, Gross' failure to keep an accurate log might have been an adequate ground for his dismissal.
690 Here, however, it is my conclusion, on the foregoing evidence, that the Respondent's purported concern about Gross' inaccurate logs arose subequent to his discharge and not before.

I am also convinced that there was little substance to Mr. Bowman's assertion that among the other reasons for the employee's dismissal was Gross' failure to report the accident and the damage done to the trailer. As found earlier herein Gross, in fact, had promptly reported the accident to Marler and it was admitted that, at that time, he had offered to pay for the damage. In addition there was the testimony of Gross, which I now credit, that on November 21, Bowman stated that it would be satisfactory if Gross made arrangements with Thacker, the dock foreman, to pay for the repairs to the trailer. Such a statement would indicate that at that point, insofar as Bowman was concerned, the incident was closed. Under these circumstances, and on the foregoing facts, it is my conclusion that the motivating cause for Gross's discharge on the morning of November 22 was the knowledge, acquired by the Respondent on the preceding afternoon, that Gross was interested in the Teamsters. Although Bowman may have had some cause for dissatisfaction with this

employee's work prior to that time, as the Court of Appeals for the Third Circuit observed in a somewhat similar case, "it apparently became intolerable only after he had joined the Union." *N. L. R. B.* v. *Electric City Dyeing Co.*, 178 F. 2d 980, 983 (C.A. 3). In view of these findings, it is my conclusion that the real cause for Gross' discharge was his interest in the Teamsters and not the reasons assigned by the Company. Accordingly, I find that by this action the Respondent violated Section 8 (a) (3) and (1) of the Act.

There remains the question as to whether Gross disqualified himself for reinstatement either by the man-
691 ner in which he kept his logs prior to his discharge or by any of his picket line activity in the period subsequent thereto. Respondent's officials testified that the penalty for keeping false or inaccurate logs had always been discharge. Mr. Bowman, who had been in the trucking business for many years, could testify to only one discharge prior to Gross', that of Hyatt, which he attributed, in part, to false logs. Since this employee was rehired shortly after his discharge, quite obviously the Respondent itself did not consider the man unfit for further employment because of his failure to keep accurate logs. Consequently, it would not appear that Gross should be denied reinstatement on this ground. At the hearing the Respondent endeavored to prove that Gross' picket line conduct was such as to place him beyond the pale of the Act. In this connection the Examiner ruled that any evidence which would tend to prove that Gross was involved in any specific misconduct would be received. The Respondent offered the pleadings filed in the State injunctive proceeding as well as the opinion and the decree of the Court which enjoined all picketing for a period of months. Apart from indicating that such violence and misconduct may have occurred during the long strike, neither these records nor the transcript in this case present any evidence that Gross himself participated in any unprotected concerted activity throughout this period. "Unauthorized acts of violence on the part of individual strikers are not chargeable to other Union Members in the absence of proof that identifies them as participating in such violence." *N. L. R. B.* v. *Deena Artware, Inc.*, 198 F. 2d 645, 652 (C.A. 6)

In the light of the present record, therefore, it is my conclusion that Gross is qualified for reinstatement.[19]

692 *C. Case No. 1985; the Allegations, the Evidence and Conclusions with Respect Thereto*

The General Counsel alleged that the Respondent illegally assisted District 50 in violation of Section 8 (a) (2) and (1) of the Act. According to the Company, it recognized District 50 only after a poll of its employees proved that that organization represented a majority. It denied all allegations of illegal assistance.

In May 1954, as noted earlier, the State Court injunction entered against the Teamsters was modified so as to permit peaceful picketing. That union then reestablished its picket line in front of the Company's Gadsden terminal. Abourt May 10, John Wilson[20] and two other drivers called on Bowman. According to Wilson, he told Bowman the employees would like to have a contract and that he had been in touch with an organizer for District 50. A few days later Wilson and four other employees met with Bowman again. Wilson testified that at this meeting the pay scale which would be acceptable to the drivers was discussed, that the committee urged Bowman to meet with District 50 officials in Birmingham to consider a contract, and that Bowman agreed to call his drivers together for a meeting in Gadsden where a poll could be taken on the question of whether the men cared to have District 50 represent them.

About the middle of May, Edward Peyton, an organizer for District 50, met with Bowman, told the latter he represented a majority of the employees and suggested that they meet in Birmingham the following week. Pursuant to this suggestion, on about May 20 and 21, Bowman and his attorney, Mr. Maurice F. Bishop, met with Peyton

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[19] I also find that, in the context of discrimination against Lackey and Gross, the interrogation of Jordan and Blackburn as to the Union meeting by Lockridge and Bowman, constituted independent violations of Section 8 (a) (1) of the Act Sears Roebuck & Co., 109 NLRB No. 102, fn. 2; Dalton Company, 109 NLRB No. 175.

[20] Wilson enjoyed a somewhat different status from that of the other drivers. He was a brother-in-law of Bowman and owned two tractor-trailers, one of which he drove for the Company; the second he leased to the Respondent.

693 and E. E. Hollifield, the latter being Regional Director for District 50, and on two successive days discussed the terms of an agreement.[21] According to Mr. Hollifield, the parties considered at length the draft of a proposed contract, among the provisions which received the greatest attention being those on wages, seniority, vacations, and grievances and arbitration. Bowman testified that at these meetings he did not ask the representatives of District 50 for any proof of their claim to majority representation but that he discussed a contract with them on the assumption that they were authorized to do so.

Immediately after these conferences Bowman notified all pickup men, delivery men and drivers at his terminals in Gadsden, Chattanooga, Birmingham, Atlanta and Memphis that they were to meet at the company headquarters in Gadsden on Saturday, May 22. About 75 employees arrived for this meeting.[22] Included in the audience were Frank Wofford, secretary-treasurer of the Respondent, and Terminal Managers Ralph Cannon and James Armstrong. Bowman called the meeting to order and then asked that all those who wanted District 50 to represent them to signify by raising their hands. All present did so. He then asked for those opposed to that organization to signify their opposition in the same manner, but no one expressed any dissent. After he had polled the men a number of them questioned him about the type of contract they could anticipate. At the same time authorization cards were distributed among the employees.[23] In addition to authorizing District 50 to represent the
694 signer, these cards also authorized a checkoff of union dues from the signatory's wages. According to Walter H. Howran, one of the drivers present, in response to a question from some of the men as to what they would have to do about paying their union dues, Bowman stated that "if th[illegible] want to pay them today and have to

[21] Peyton attended only the first day of these negotiations.

[22] The Company supplied gas for transportation of those from out-of-town terminals in the same manner that it bore its employees' travel expenses to a regular business meeting.

[23] At the hearing Bowman was asked whether District 50 cards were distributed immediately after the polling. He answered: "There were some cards around there and employees were signing them."

pay them today—he would advance it to them from their next week's paycheck and give them the money." Shortly thereafter, Bowman withdrew from the meeting. Some 63[24] signed cards were then collected from those present. The employees then voted on a slate of officers for a local organization of District 50 and Wilson was elected president.

During a recess in the meeting Wilson met with Peyton and Hollifield in downtown Gadsden where, at about 2:30 p.m., he turned over the signed cards to the latter, the first they had actually received.[25] Hollifield then telephoned Bowman to tell him that he wanted to arrange a meeting with the latter's employees. Bowman suggested that since District 50 represented 51 percent of his men the meeting could be held at the terminal that afternoon. Hollifield accepted and, with his associate Peyton, went out to company property where he spent sometime discussing the objectives of his organizations with the employees. Then the representatives of District 50 met with Bowman and after a meeting which lasted an hour or two executed a collective bargaining agreement which, among other things provided for recognition of District 50 as exclusive bargaining agent of all drivers, pickup men and delivery men, contained a union-security clause which gave District 50 a checkoff of union dues, granted the employees slightly better vacation benefits than they had previously enjoyed, established a lower pay scale for the drivers than
695 they were getting currently[26] and had a section on grievances and arbitration. Mr. Bowman testified that since May 22 the Company had been checking dues off the pay of all employees who signed cards and that, in addition, pursuant to an agreement with District 50, initiation fees amounted to $7.50 per member, had been taken out of the employees' pay.[27]

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24 Peyton testified he received this number that afternoon.

25 Wilson testified that prior to Bowman's poll of the employees on May 22, neither he (Wilson) nor anyone else had signed an authorization card.

26 The contract provided for pay at the rate of 6 cents a mile. At the time and throughout the strike the Company had been paying 6½ cents. Before the picketing began drivers received 5¾ cents per mile.

27 He also testified that no money was transmitted to District 50 before it was checked off the employee's pay.

At the hearing the Respondent seemingly endeavored to prove that the contract which emerged from the meeting on May 22 was the result of negotiations had on that day and that it differed materially from the draft which the parties had discussed in Birmingham earlier that week. This, however, did not accord with the testimony of the parties. Thus, Hollifield testified that on May 22, apart from the insertion of a new provision on grievances and arbitration, only two minor changes were made in the draft which had been negotiated in Birmingham.[28] Bowman's testimony was substantially to the same effect. From the record it appears that, aside from the parties, only Wilson had a copy of the draft contract before the meeting. He testified that he took it to the terminal on the morning of May 22 and made it available to the drivers who were arriving for the meeting so that, according to Wilson, it was a subject of conversation among the men before Bowman opened the meeting and polled them on their preference.

696 CONCLUDING FINDINGS

In singular contrast with the Teamsters' inability to contact Bowman and present their claim to represent his employees, noted earlier in Case No. 1950, very shortly after his brother-in-law, Wilson, indicated that District 50 had an interest in representing the drivers, and without any proof of its claim to a majority, the company president began conferring with officials of the latter union. At this point not a single employee had actually signed a card in District 50, for it was not until after Bowman's poll that any of the drivers signed cards authorizing that union to represent them. Nevertheless, despite the lack of any such authority, company and District 50 representatives conferred for 2 days in negotiating the details of a contract. Then, a copy of their draft agreement was given to Wilson and on May 22 all employees at the different terminals were brought to Gadsden at company expense and in the same manner as if they were to attend a regular business meeting. Before Bowman called

[28] One of these changes related to the manner in which the employer was to remit checked off dues; the other merely involved the insertion of the word "Union" wherever the word "Local Union" appeared in the original draft.

them to order, Wilson had had an opportunity to show the draft contract to the drivers present. With so many manifestations of the Company's preference it was not surprising that on the show of hands requested by Mr. Bowman, all present voted for District 50. Thereafter the company president answered queries about the terms of an agreement with District 50 and when a question was raised as to the employees' liability for dues in the new organization, Bowman assured his audience that if necessary he would advance the money. Then in rapid succession and within less than three hours: (1) the employees signed cards authorizing District 50 to represent them and authorizing the employer to deduct dues from their wages; (2) a local union was established and Wilson was designated as its president; (3) at Bowman's suggestion, representatives of District 50 held their first meeting
697 with the employees at the company terminal, even though this required that they cross the Teamsters' picket line; and then (4) these same organizers met with Bowman to put the finishing touches on a contract, all the material provisions of which, except one,[29] had been negotiated several days before. On these facts, it is my conclusion, and I find, that the Respondent rendered illegal support and assistance to District 50 and interfered with the free choice of employees to join or not join a labor organization within the meaning of Section 7 and Section 8 (a) (2) and (1) of the Act. *Knickerbocker Plastic Co., Inc.*, 96 NLRB 586, 587; *Meyer & Welch, Inc.*, 91 NLRB 1102, 1112-1113; *Sears Roebuck & Company*, 110 NLRB No. 30; *Standard Transformer Company*, 97 NLRB 669, 677-678, 680-681, enforced 202 F. 2d 846 (C.A. 6).

IV. The Effect of the Unfair Labor Practices Upon Commerce

The activities of the Respondent set forth in Section III, above, occurring in connection with its operations described in Section I, above, have a close, intimate and substantial relation to trade, traffic and commerce among the several States and tend to lead to labor disputes bur-

[29] That on grievances and arbitration.

dening and obstructing commerce and the free flow of commerce.

V. The Remedy

As it has been found that the Respondent has engaged in, and is engaging in unfair labor practices, it will be recommended that it cease and desist therefrom and take certain affirmative action designed to effectuate the policies of the Act.

698 Since I have found that the Respondent discriminated with respect to the hire and tenure of employment of Welch Gross, the customary recommendation would be that the Respondent offer him immediate and full reinstatement. The day after his discharge, however, Gross joined in the Teamsters' picketing of the Respondent's terminal which was still in progress at the time of the hearing. Under these circumstances, I will recommend that the Respondent offer Gross, upon his application, reinstatement to his former or substantially equivalent position without prejudice to his seniority or other rights and privileges. I shall also recommend that the Respondent make him whole for any loss of pay he has suffered or may suffer by reason of the Respondent's refusal, if any, to reinstate him, by payment to him of a sum of money equal to that which he normally would have earned as wages (1) from the time of his discharge until he went on strike and (2) from the date of his application to return to work until the date of the Respondent's offer of reinstatement. *Knickerbocker Plastic Co.*, 104 NLRB 514, 539. The back pay provided for herein shall be computed on a quarterly basis in the manner established by the Board in *F. W. Woolworth Company*, 90 NLRB 289; earnings in one particular quarter shall have no effect on the back-pay liability for any other period.[30]

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[30] As stated above, I am convinced that the Respondent discriminated against Gross because of his participation in union activities and that only in the event it is ordered to take the steps outlined herein will its conduct be remedied. Although I have rejected, for the reasons already stated, the Respondent's contention that Gross was discharged for failure to keep accurate logs in performance of his duties as a driver and although I do not believe, on the basis of the Company's action with respect to Hyatt that Gross' failure in this regard renders him manifestly unfit for further employment by the Respondent, I wish to emphasize that in complying with these recommendations the Company is in no manner precluded from enforcing by discharge, or any other disciplinary action, all nondiscriminatory rules that are designed to insure the strict adherence of its drivers to the regulations of the Interstate Commerce Commission.

699 Since I have found that on November 22, the Respondent discriminatorily changed its assignment practice with respect to Joe Lackey, I shall recommend that upon the latter's return to work,[31] his future assignments be made on a nondiscriminatory basis and without penalty for his having engaged in concerted and union activities.

Since I have found that the Respondent assisted and contributed financial and other support to District 50, the effects of this interference, as well as the Respondent's continued recognition of District 50 as the bargaining representative of its employees, constitute a continuing obstacle to the free exercise by its employees of their rights to self-organization and to bargain collectively through representatives of their own choosing. I will therefore recommend that the Respondent withhold recognition of District 50 and refrain from dealing with it unless and until it shall have been certified by the Board as the collective bargaining representative of the Respondent's employees. Having found that the agreement entered into between the Respondent and District 50 has been a means whereby the Respondent has utilized an employer-assisted labor organization to frustrate self-organization and defeat genuine collective bargaining by its employees, I will recommend that the Respondent cease giving effect to any agreement between it and District 50, or to any modification or extension thereof. Nothing in this recommendation should be taken, however, to require the Respondent to vary those wage, hour and other substantive features of its relations with the employees themselves, if any, which the Respondent has established in performance of this agreement. Further, because of the circum-
700 stances in which the checkoff authorizations were secured, as set forth in the findings hereinabove, and as a means of restoring the *status quo*, I shall recommend that the Respondent reimburse each employee for the amount of fees and dues which the Company has checked off his wages and paid over to District 50.

I will also recommend that the Respondent, upon reasonable request make available to the Board and its agents,

[31] At the time of the hearing, Lackey was among those still picketing the Respondent's terminal.

all payroll and other records pertinent to an analysis of the amount due as back pay.

Since I have found that Respondent, by various acts, interfered with, restrained, and coerced its employees in the exercise of the rights guaranteed in the Act and particularly because of the discriminatory discharge of Gross and the unlawful assistance to District 50 I am persuaded that the unfair labor practices committed are related to other unfair labor practices proscribed and that the danger of their commission in the future is to be anticipated from Respondent's conduct in the past. Accordingly, in order to make effective the interdependent guarantees of Section 7 and thus effectuate the policies of the Act, I will recommend that the Respondent cease and desist from in any manner infringing upon the rights of employees guaranteed by the Act. *May Department Stores* v. *N. L. R. B.*, 326 U.S. 376, 386-392.

CONCLUSIONS OF LAW

1. The Teamsters and District 50 are labor organizations within the meaning of the Act.

2. By discriminating in regard to the hire and tenure of employment of Welch Gross and Joe Lackey, thereby discouraging membership in the Teamsters, Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8 (a) (3) of the Act.

701 3. By interfering with the administration of District 50 and contributing support to it, the Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8 (a) (2) of the Act.

4. By interfering with, restraining and coercing its employees in the exercise of the rights guaranteed in Section 7 of the Act, the Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8 (a) (1) of the Act.

5. The aforesaid unfair labor practices are unfair labor practices affecting commerce, within the meaning of Section 2 (6) and (7) of the Act.

RECOMMENDATIONS

Upon the basis of the foregoing findings of fact and conclusions of law and upon the entire record in the case, I recommend that Respondent, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Discouraging membership in the Teamsters, or any other labor organization of its employees, by discharging or refusing to reinstate any of its employees or by discriminating in any other manner in regard to their hire or tenure of employment, or any term or condition of their employment;

(b) Interfering with the administration of District 50 or contributing support to it, or to any other labor organization;

(c) Giving effect to the collective bargaining agreement, dated May 22, 1954, between the Respondent and District 50, or to any extension, renewal or modification thereof, or any other contract agreement between the Respondent and the said labor organization which may now be in force;

702 (d) Recognizing District 50 as the representative of any of its employees for the purpose of dealing with the Respondent concerning grievances, labor disputes, wages, rates of pay, hours of employment, or other conditions of employment, unless and until the said labor organization shall have been certified as such representative by the Board;

(e) In any other manner interfering with, restraining, or coercing its employees in the exercise of the right to self-organization, to form labor organizations, to join or assist the Teamsters, or any other labor organization, to bargain collectively through representatives of their own choosing, and to engage in concerted activities for the purpose of collective bargaining or other mutual aid or protection, or to refrain from any or all of such activities, except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment, as authorized in Section 8 (a) (3) of the Act.

2. Take the following affirmative action, which I find will effectuate the policies of the Act:

(a) Offer to Welch Gross, upon his application, immediate and full reinstatement to his former or substantially equivalent position, without prejudice to his seniority or other rights and privileges, and make him whole for any loss of pay he may have suffered by reason of the Respondent's discrimination against him, in the manner provided in the section hereof entitled "The remedy";

(b) Offer assignments to Joe Lackey, upon his reemployment, without discrimination because of that employee's union or concerted activities;

(c) Withdraw and withhold all recognition from District 50, as the representative of its employees for the purpose of dealing with the Respondent concerning grievances,
labor disputes, wages, rates of pay, hours of em-
703 ployment, or other conditions of employment, unless
and until said labor organization shall have been certified as such representative by the Board;

(d) Reimburse all its employees whose initiation fees and membership dues in District 50 were checked off, for the amounts thus deducted from their wages since May 22, 1954;

(e) Post at all its terminals, copies of the notice attached hereto and marked Appendix A. Copies of said notice, to be furnished by the Regional Director for the Tenth Region, shall, after being duly signed by the Respondent, be posted by it immediately upon receipt thereof, and maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to insure that said notices are not altered, defaced, or covered by any other material;

(f) Notify the Regional Director for the Tenth Region, in writing, within 10 days from the date of this Intermediate Report what steps the Respondent has taken to comply therewith.

I also recommend that unless on or before 20 days from the receipt of this Intermediate Report the Respondent notifies the said Regional Director in writing that it will comply with the foregoing recommendations, the National Labor Relations Board issue an order requiring the Respondent to take the action aforesaid.

APPENDIX A

NOTICE TO ALL EMPLOYEES

PURSUANT TO

THE RECOMMENDATIONS OF A TRIAL EXAMINER

of the National Labor Relations Board, and in order to effectuate the policies of the National Labor Relations Act, we hereby notify our employees that:

WE WILL NOT discourage membership in INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA, LOCAL NO. 612, AFL, or in any other labor organization of our employees, by discharging or refusing to reinstate any of our employees, or in any other manner discriminating in regard to their hire or tenure of employment, or any term or condition of their employment.

WE WILL offer to Welch Gross, upon his application, immediate and full reinstatement to his former or substantially equivalent position, without prejudice to any seniority or other rights and privileges previously enjoyed, and make him whole for any loss of pay suffered as a result of the discrimination against him.

WE WILL offer assignments to Joe Lackey, upon his reemployment, without discriminating against him because of his union or concerted activities.

WE WILL NOT interfere with the formation or administration of any labor organization or contribute financial or other support to it.

WE WILL NOT give effect to the agreement dated May 22, 1954 with District 50, United Mine Workers of America, or to any contract or agreement with that organization which may now be in force.

WE WILL reimburse all our employees, whose initiation fees and membership dues in District 50, United Mine Workers of America, have been checked off, for the amounts thus deducted from their wages.

WE WILL withhold all recognition from District 50, United Mine Workers of America, as representative of any of our employees for the purposes of collective bargaining unless and until said organization shall have been certified as such representative by the National Labor Relations Board.

All our employees are free to become, remain, or refrain from becoming members of any labor organization, except to the extent that this right may be affected by agreements in conformity with Section 8 (a) (3) of the National Labor Relations Act, as amended October 22, 1951.

BOWMAN TRANSPORTATION, INC.
(Employer)

Dated_____ By_____
(Representative) (Title)

Dated at Washington, D. C., this 26th day of November 1954.

ROBERT E. MULLIN
Trial Examiner

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704 BEFORE THE NATIONAL LABOR RELATIONS BOARD
Washington, D. C.

Case Nos. 10-CA-1950 and 10-CA-1985

(Title Omitted)

Exceptions of the Respondent Company—Filed January 14, 1955

Comes now Bowman Transporation, Inc., the Respondent in the above-styled cases and files these its Exceptions to the Intermediate Report and Recommended Order of Trial Examiner Robert E. Mullin, issued November 26, 1954.

1.

Respondent excepts to the Trial Examiner's finding of fact, (I.R., p. 3, l. 51 et seq.) that at the meeting held on the morning of November 22, 1954 Mr. Bowman mentioned the union and employee activities therein to any of the employees there assembled; such finding of the Trial Examiner being contrary to the weight of the evidence contained in the record when read and considered as a whole.

2.

Respondent excepts to the finding of fact of the Trial Examiner (I.R., p. 3, l. 17 et seq.) that the company president at the meeting held on the morning of November 22,
told another of his drivers, J. P. Jordan, that he was
705 trying to play both ends and the middle, and that he
does not have any friends as of now in the office; such finding being contrary to the weight of the evidence and the facts appearing in the record.

3.

The Respondent excepts to the finding of the Trial Examiner (I.R., p. 4, l. 5 et seq. and l. 57) that company

Vice-President Lockridge drove to the home of employee Jordan, initiated a conversation about the union and questioned him about where the meeting was to be held; the same being contrary to the weight of the evidence contained in the record when read and considered as a whole.

4.

Respondent excepts to the conclusion of the Trial Examiner (I.R., p. 4, l. 25 et seq.) that Bowman and Lockridge were engaged in unlawful surveillance of the employees' union activities and thereby violated Section 8 (a)(1) of the Act; the same being contrary to the weight of the evidence in the record. It is noted that the complaint charged, as did General Counsel's allegations, that these two officials of Respondent engaged in unlawful surveillance of the *employees' union meeting*, whereas the finding of the Trial Examiner is that such officers engaged in unlawful surveillance of the employees' *other activities*. The proof offered was entirely at variance with the charge that a union meeting was placed under surveillance. No amendment was made at the hearing in this regard and, therefore, the complaint, with which the evidence must conform, still alleges surveillance of the employees' *union meeting*. The testimony in the record completely fails to substantiate in any degree surveillance of an employees' union meeting and the Trial Examiner's finding does not conform to the proof or the charge.

706

5.

Respondent excepts to the finding of the Trial Examiner (I.R., p. 5, l. 21 et seq.) that Respondent offered no evidence that during the preceding two years any driver other than employee Lackey had been dispatched on the run from Gadsden to Decatur, Alabama; such finding being directly contrary to facts as appear in the record.

6.

Respondent excepts to the conclusion of the Trial Examiner (I.R., p. 5, l. 36 et seq.) that Bowman threatened

Lackey with loss of a previously granted preference as to his truck runs which would seriously affect his working conditions and his tenure of employment, and that such was coercive and violative of Sections 8 (a)(3) and (1) of the Act; such conclusion being contrary to the weight of the evidence contained in the record.

7.

Respondent excepts to the finding of the Trial Examiner (I.R., p. 6, l. 1 & 2 et seq.) that former employee Welch Gross credibly testified that no one ever asked him to prepare and file a report about this previous accident; such finding being contrary to the weight of the evidence in the record.

8.

Respondent excepts to the finding of the Trial Examiner (I.R., p. 7, l. 2 et seq.) that none of the Respondent's witnesses testified that the drivers were required to file a written report of an accident; the same being directly contrary to the only reasonable inference
707 which could be drawn from the testimony of all of Respondent's witnesses, and such finding is contrary to the weight of the evidence.

9.

Respondent excepts to the finding of the Trial Examiner (I.R., p. 7, l. 26, et seq.) that company officials were either unaware of particular infractions of the ten hour rule or that they placidly condoned the practice; the same being directly contrary to the great weight of evidence appearing in the record.

10.

Respondent excepts to the finding of the Trial Examiner (I.R., p. 8, l. 1 et seq.) that it was reasonable to conclude that Bowman saw former employee Gross on the day that he and Lockridge visited Burns Park; the same being contrary to the weight of the evidence appearing in the record.

11.

Respondent excepts to the conclusion of the Trial Examiner (I.R., p. 8, l. 12 et seq.) that Mr. Bowman's testimony cannot be credited with respect to the reasons given by him for the discharge of former employee Gross; such conclusion being contrary to the great weight of testimony which appears in the record.

12.

Respondent excepts to the conclusion of the Trial Examiner (I.R., p. 9, l. 18 et seq.) that the real cause for Gross' discharge was his interest in the Teamsters union; the same being a conclusion drawn by the Trial Examiner upon biased testimony of the employee involved and is contrary to the great weight of testimony appear-
708 ing in the record and any reasonable inference which could be drawn therefrom.

13.

Respondent excepts to the conclusion of the Trial Examiner (I.R., p. 9, l. 47 et seq.) that Gross was not disqualified for reinstatement because of his alleged activities on the Teamsters' picket line; the same being contrary to law, as interpreted by applicable Board and Court decisions, and contrary to all applicable equitable principles.

14.

Respondent excepts to the conclusion of the Trial Examiner (I.R., p. 9, l. 54 et seq.) that the alleged interrogation of Jordan and Blackburn by Lockridge and Bowman constituted independent violations of Section 8(a)(1) of the Act; the "finding" of such conclusion being contrary to the great weight of the evidence, and the "violation" finding placed on such conclusion being contrary to law as interpreted by controlling Board and Court decisions.

15.

Respondent excepts to the finding of the Trial Examiner (I.R., p. 10, l. 55 et seq.) that employee Wilson enjoyed a "somewhat different status from that of the other

drivers", since he was a brother-in-law of Bowman; the same being directly contrary to all applicable testimony appearing in the record, and amounting only to an unwarranted presumption indulged in by the Trial Examiner.

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16.

Respondent excepts to the finding of the Trial Examiner (I.R., p. 10, l. 50 et seq.) that a number of employees questioned Bowman about the type of contract they could anticipate while *at the same time* authorization cards were being distributed among the employees; the same being directly contrary to all applicable testimony appearing in the record, and amounting in effect to a direct distortion of all facts as appear in the record.

17.

Respondent excepts to the statement of the Trial Examiner (I.R., p. 11, l. 6, et seq.) that Bowman told an employee he would advance their union dues to them from their next week's pay check; inasmuch as the record conclusively shows that union dues and initiation fees were forwarded to the union *only* as they were deducted from the employees' pay. There is no evidence appearing in the record that Bowman *advanced* money to the employees or to the union for such dues or initiation fees.

18.

Respondent excepts to the prejudicial inference created by the Trial Examiner (I.R., p. 11, l. 17 et seq.) that Bowman suggested on his own initiative that the union meeting be held at the terminal, inasmuch as the record shows that the suggestion was prompted by Regional Director Hollifield's statement he would probably have to arrange such a meeting with the employees in down town Gadsden.

19.

Respondent excepts to the conclusions of the Trial Examiner (I.R., p. 12, l. 38 et seq.) that Respondent
710 rendered illegal support and assistance to District 50 and interfered with the free choice of employees

to join or not join a labor organization; the same being contrary to the overwhelming weight of credible testimony appearing in the record.

20.

Respondent excepts to the recommendation of the Trial Examiner (I.R., p. 13, l. 7 et seq.) that Respondent should offer Gross, upon his application, reinstatement to his former or equivalent position; the same being a gross injustice and intolerable burden placed upon Respondent, cannot be supported by the weight of the evidence, and is contrary to law. On the same grounds, Respondent also excepts to the recommendation that Respondent make Gross whole for any loss of pay which he would normally have earned as wages,

1. From the time of his discharge until he went on strike (this was almost immediately) and

2. From the date of his application to return to work (Gross has made no such application) until the date of Respondent's offer of reinstatement.

21.

Respondent excepts to the recommendation of the Trial Examiner (I.R., p. 18, l. 23 et seq.) that upon the return to work of Joe Lackey the Respondent should not discriminate against him regarding his future assignments, inasmuch as the record shows that such would require the Respondent to continue in effect a situation regarding his work assignments which was obviously recognized at the hearing to have been only a temporary assignment. The enforcement of such a recommendation, instead of requiring nondiscrimination, would require a direct preference for such employee.

711

22.

Respondent excepts to the recommendation of the Trial Examiner (I.R., p. 13, l. 33 et seq.) that Respondent withhold recognition of District 50 and refrain from dealing with it unless and until it had been certified by the Board;

such recommendation would place an intolerable burden upon the respondent and in effect leave it confronted with the insatiable demands of two unions instead of only one, the present situation.

23

Respondent most vigorously excepts to the recommendation of the Trial Examiner (I.R., p. 14, l. 10 et seq.) that Respondent reimburse each employee for the amount of fees and dues which the company has checked off his wages and paid over to District 50; the same placing an unjust, inequitable and intolerable burden upon the Respondent. Such recommendation completely ignores all credible testimony in the record, is unlawful, grossly exceeds the punitive authority contained in the Labor-Management Relations Act, and is contrary to all sense of equity and justice.

24.

Respondent excepts to the finding of the Trial Examiner (I.R., p. 14, l. 23 et seq.) that the alleged unfair labor practices permitted in the past are related to other alleged unfair labor practices and that such may be anticipated in the future; such finding being inequitable, prejudicial, contrary to law and contrary to the weight of the evidence appearing in the record. Respondent excepts to the conclusions of law of the Trial Examiner (I.R., p. 14, l. 37 et seq.) that Respondent engaged in unfair labor practices with respect to the hire and tenure of em-
712 ployment of Welch Gross and Joe Lackey in violation of Section 8 (a)(3) of the Act; the same being contrary to the great weight of the evidence appearing in the record, and applicable Board and Court Decisions.

25.

Respondent excepts to the conclusions of law of the Trial Examiner (I.R., p. 14, l. 4, et seq.) that the Respondent interfered with the administration of District 50, contributed support to it, and thereby engaged in unfair labor

practices within the meaning of Section 8 (a)(2) of the Act; the same being contrary to the great weight of evidence appearing in the record.

26.

Respondent excepts to the conclusion of law of the Trial Examiner (T.R., p. 14, l. 45 et seq.) that the Respondent has interfered with, restrained, and coerced his employees in the exercise of rights guaranteed in Section 7 of the Act; such conclusion being without foundation in the record, contrary to law, and contrary to the concrete decisions of the National Labor Relations Board and Courts.

WHEREFORE, the Respondent prays that the Intermediate Report insofar as it pertains to the above exceptions be reversed and that the Board find that the Respondent in fact and in law has not engaged in any acts violative
713 of Section 8 (a)(3), Section (a)(2) and Section 8 (a)(1) of the Act.

This the 14th day of January, 1955.

Respectfully submitted,

Maurice F. Bishop
Attorney for Respondent

327 Frank Nelson Bldg.
Birmingham, Alabama

Alexander E. Wilson, Jr.
Attorney for Respondent

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Attorney for Respondent

Wilson, Branch and Smith
615 Rhodes Haverty Bldg.
Atlanta 3, Georgia

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BEFORE THE NATIONAL LABOR RELATIONS BOARD

Case Nos. 10-CA-1956 and 10-CA-1985

BOWMAN TRANSPORTATION, INC.

and

INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA, A.F.L., LOCAL UNION No. 612

Decision and Order—Filed April 22, 1955

On November 26, 1954, Trial Examiner Robert E. Mallin issued his Intermediate Report in the above-entitled proceedings, finding that the Respondent had engaged in and was engaging in certain unfair labor practices, and recommending that it cease and desist therefrom and take certain affirmative action, as set forth in the copy of the Intermediate Report attached hereto. Thereafter, the Respondent filed exceptions to the Intermediate Report and a supporting brief.

The Board has reviewed the rulings made by the Trial Examiner at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed. The Board has considered the Intermediate Report, the exceptions and brief of the Respondent, and the entire record in these cases, and hereby adopts the findings,[1] conclusions, and recommendations of the Trial Examiner, with the following additions and modifications.

715 1. The Trial Examiner found that employee Welch Gross did not disqualify himself for reinstatement by his conduct while picketing the Respondent's terminal in Gadsden, Alabama. The Respondent urges that the

[1] The Trial Examiner found, and we agree, that the Respondent's interrogation of Jordan and Blackburn as to the Union Meeting, and its surveillance of this meeting, constituted independent violations of Section 8 (a)(1) of the Act. However, the Trial Examiner failed to effectuate these findings by appropriate remedial recommendations. Accordingly, in fashioning a remedy in these proceedings, we shall order that the Respondent cease and desist from interrogating its employees concerning union activities or from engaging in surveillance of such union activities.

Board's decision in *B.V.D. Company, Inc.*,[2] is determinative of its contention that Gross should be denied reinstatement because of his picket line activity.

On the state of the record before us, we are not convinced that sufficient evidence exists regarding any alleged acts of misconduct by Gross which would warrant denial of reinstatement to him, nor are we persuaded that the facts established herein are comparable to those appearing in the *B.V.D.* case. Accordingly, we adopt the Trial Examiner's recommendation that the Respondent offer to Gross, upon his application, reinstatement to his former or substantially equivalent position.

2. We concur in the Trial Examiner's finding that the Respondent rendered illegal support and assistance to District 50, United Mineworkers of America, and thereby violated Section 8(a)(2) and 8(a)(1) of the Act, and we adopt his recommendations based thereon. However, we do not adopt that portion of the Trial Examiner's recommended order which directs the Respondent to reimburse its employees for the amount of fees and dues which the Respondent checked off their wages and paid over to District 50. There is no evidence in the record that the Respondent enforced an involuntary checkoff or otherwise coerced its employees into paying these dues and fees. We therefore shall not order reimbursement to the employees of the dues and fees thus checked off.[3]

ORDER

Upon the basis of the entire record in these cases, and pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby orders that the Respondent, Bowman Transportation, Inc., Gadsden, Alabama, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Discouraging membership in International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Help-

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[2] 110 NLRB No. 206. Members *Murdock* and *Peterson* dissented in this case.

[3] See *Peerless Quarries Inc.*, 92 NLRB 1194.

ers of America, AFL, Local No. 612, or any other labor organization of its employees, by discharging or refusing to reinstate any of its employees or by discriminating in any other manner in regard to their hire or tenure of employment, or any term or condition of their employment;

(b) Assisting in the administration of District 50, United Mine Workers of America, or contributing support to it, or to any other labor organization;

(c) Giving effect to the collective bargaining agreement, dated May 22, 1954, between the Respondent and District 50, United Mine Workers of America, or to any extension, renewal or modification thereof, or any other contract agreement between the Respondent and the said labor organization which may now be in force;

(d) Recognizing District 50, United Mine Workers of America, as the representative of its employees for the purpose of dealing with the Respondent concerning grievances, labor disputes, wages, rates of pay, hours of employment, or other conditions of employment, unless and until the said labor organization shall have been certified as such representative by the Board;

(e) Interrogating its employees concerning their activities on behalf of International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, AFL, Local No. 612, or any other labor organization in a manner constituting interference, restraint, or coercion in violation of Section 8 (a) (1); and from engaging in the surveillance of its employees at such meetings; and

(f) In any other manner interfering with, restraining, or coercing its employees in the exercise of the right to self-organization, to form labor organizations, to join or assist the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, AFL,
716 Local No. 612, or any other labor organization, to bargain collectively through representatives of their own choosing, and to engage in concerted activities for the purpose of collective bargaining or other mutual aid or protection, or to refrain from any or all of such activities, except to the extent that such right may be affected by an agreement requiring membership in a labor organization as

a condition of employment, as authorized in Section 8 (a) (3) of the Act.

2. Take the following affirmative action, which the Board finds will effectuate the policies of the Act:

(a) Offer to Welch Gross, upon his application, immediate and full reinstatement to his former or substantially equivalent position, without prejudice to his seniority or other rights and privileges, and make him whole for any loss of pay he may have suffered by reason of the Respondent's discrimination against him, in the manner set forth in the section of the Intermediate Report entitled "The remedy;"

(b) Offer assignments to Joe Lackey, upon his reemployment, without discrimination because of that employee's union or concerted activities;

(c) Withdraw and withhold all recognition from District 50, United Mine Workers of America, as representative of its employees for the purpose of dealing with the Respondent concerning grievances, labor disputes, wages, rates of pay, hours of employment, or other conditions of employment, unless and until the said labor organization shall have been certified as such representative by the Board;

(d) Post at all its terminals copies of the notice attached hereto and marked Appendix A.[4] Copies of
717 said notice, to be furnished by the Regional Director for the Tenth Region, shall, after being duly signed by the Respondent, be posted by it immediately upon receipt thereof, and maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to insure that said notices are not altered, defaced, or covered by any other material;

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[4] In the event that this Order is enforced by a decree of a United States Court of Appeals, there shall be substituted for the words "PURSUANT TO A DECISION AND ORDER" the words "PURSUANT TO A DECREE OF THE UNITED STATES COURT OF APPEALS, ENFORCING AN ORDER."

(e) Notify the Regional Director, in writing, within ten (10) days from the date of this Order, what steps the Respondent has taken to comply herewith.

Dated, Washington, D. C., April 22, 1955.

ABE MURDOCK, Member
IVAR H. PETERSON, Member
PHILIP RAY RODGERS, Member
NATIONAL LABOR RELATIONS BOARD.

(SEAL)

APPENDIX A TO DECISION AND ORDER

NOTICE TO ALL EMPLOYEES

PURSUANT TO

DECISION AND ORDER

of the National Labor Relations Board, and in order to effectuate the policies of the National Labor Relations Act, we hereby notify our employees that:

WE WILL NOT discourage membership in INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA, LOCAL NO. 612, AFL, or in any other labor organization of our employees, by discharging or refusing to reinstate any
718 of our employees, or in any other manner discriminating in regard to their hire or tenure of employment, or any term or condition of their employment.

WE WILL offer to Welch Gross, upon his application, immediate and full reinstatement to his former or substantially equivalent position, without prejudice to any seniority or other rights and privileges previously enjoyed, and make him whole for any loss of pay suffered as result of the discrimination against him.

WE WILL offer assignments to Joe Lackey, upon his reemployment, without discriminating against him because of his union or concerted activities.

WE WILL NOT interrogate our employees concerning their activities on behalf of INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA, AFL, LOCAL NO. 612, or any other

labor organization in a manner constituting interference, restraint or coercion in violation of Section 8 (a) (1) of the Act, and we will not engage in the surveillance of our employees at such meetings.

WE WILL NOT interfere with the formation or administration of any labor organization or contribute financial or other support to it.

WE WILL NOT give effect to the agreement dated May 22, 1954 with DISTRICT 50, UNITED MINE WORKERS OF AMERICA, or to any contract or agreement with that organization which may now be in force.

WE WILL withhold all recognition from DISTRICT 50, UNITED MINE WORKERS OF AMERICA, as representative of any of our employees for the purposes of collective bargaining unless and until said organization shall have been certified as such representative by the National Labor Relations Board.

All our employees are free to become, remain, or refrain from becoming members of any labor organization,
719 except to the extent that this right may be affected by agreements in conformity with Section 8(a)(3) of the National Labor Relations Act, as amended October 22, 1951.

BOWMAN TRANSPORTATION, INC.
(Employer)

Dated ..... By .....
(Representative) (Title)

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725 112 NLRB No. 55 D-9119
Gadsden, Alabama

BEFORE THE NATIONAL LABOR RELATIONS BOARD

Case Nos. 10-CA-1950, 10-CA-1985

(Title Omitted)

Application to Modify Board Order and Supporting Argument

Now comes District 50, United Mine Workers of America, and does respectfully make application to the National

This notice must remain posted for 60 days from the date hereof, and must not be altered, defaced, or covered by any other material.

Labor Relations Board to modify the order made by it in the above styled cases on April 22, 1955, in the following separate and several particulars:

1. To delete and strike from said order Paragraph 1(c) thereof reading as follows:

"Giving effect to the collective bargaining agreement, dated May 22, 1954, between the Respondent and District 50, United Mine Workers of America, or to any extension, renewal or modification thereof, or any other contract agreement between the Respondent and the said labor organization which may now be in force."

2. To delete and strike from said order Paragraph 1(d) thereof reading as follows:

"Recognizing District 50, United Mine Workers of America, as the representative of its employees for the purpose of dealing with the Respondent concerning grievances, labor disputes, wages, rates of pay, hours of employment, or other conditions of employment, unless and until
726 the said labor organization shall have been certified as such representative by the Board."

3. To delete and strike from said order Paragraph 2(c) thereof reading as follows:

"Withdraw and withhold all recognition from District 50, United Mine Workers of America, as representative of its employees for the purpose of dealing with the Respondent concerning grievances, labor disputes, wages, rates of pay, hours of employment, or other conditions of employment, unless and until the said labor organization shall have been certified as such representative by the Board."

In support of this application, as to each of said paragraphs, separately and severally, District 50, United Mine Workers of America submits the following facts:

1. It is a union of national scope and is a labor organization within the meaning of Section 2(5) of the Labor Management Relations Act of 1947.

2. District 50, United Mine Workers of America, has not complied with the provisions of Section 9 of the Labor Management Relations Act of 1947.

In further support of said application for modification, as to each of said paragraphs, separately and severally, this applicant submits the following brief and argument:

1. Said paragraph of said order is unlawful.

2. Said order as set up in said paragraph is beyond the power of the National Labor Relations Board.

3. Said paragraph of said order imposes a barrier to any and all contracts, however made, between this applicant as the representative of the employees of the respondent employer and said employer.

4. Said paragraph of said order is a ban in perpetuity against contracts between this applicant and the employer named as respondent in said cases.

727 5. There is no federal law which requires that District 50, United Mine Workers of America, be first certified by the National Labor Relations Board as the representative of employees before it has the legal right to deal with the employer concerning grievances, labor disputes, wages, rates of pay, hours of employment, or other conditions of employment.

6. Under the applicable provisions of law, a labor union which represents the majority of the employees of an employer is authorized to act as the representative of such employees for the purpose of dealing with the employer concerning grievances, labor disputes, wages, rates of pay, hours of employment, or other conditions of employment and is not obligated as a condition precedent to be first certified as such representative by the National Labor Relations Board.

7. Said paragraph seeks to set up a limitation of certification by the National Labor Relations Board as a condition precedent to the right of District 50, United Mine Workers of America, to represent the majority of the employees of the employer respondent in said cases.

8. The right of District 50, United Mine Workers of America, to act as representative of the majority of the employees of the respondent employer in said cases cannot legally be cut off unless and until District 50, United Mine Workers of America shall have been certified by the National Labor Relations Board as the representative of those employees for the purpose of dealing with the employer concerning grievances, labor disputes, wages, rates of pay, hours of employment, or other conditions of employment.

9. Said paragraph operates as an absolute prohibition in perpetuity against the right of District 50, United Mine Workers of America, to act as representative of the
728 majority of the employees of the present employer named as respondent in said cases, and for that reason is unlawful and unconstitutional.

10. Said paragraph of said order imposes a penalty for non-compliance with the provisions of Section 9 of the Labor Management Relations Act greater than that imposed by law.

11. Said paragraph of said order is, in effect, administrative legislation contrary to law.

Respectfully submitted,

CRAMPTON HARRIS,
Attorney for District 50,
United Mine Workers of America.

Address of Crampton Harris:
1018-19 First National Building,
Birmingham 3, Alabama.

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730 113 NLRB No. 83 D-9359

BEFORE THE NATIONAL LABOR RELATIONS BOARD

Cases Nos. 10-CA-1950, 10-CA-1985

BOWMAN TRANSPORTATION, INC.

and

INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA, AFL, LOCAL NO. 612

Supplemental Decision and Order—Filed August 17, 1955

On April 22, 1955, the Board issued a Decision and Order in the above-entitled proceedings, finding, *inter alia*, that the Respondent (1) violated Section 8(a)(3) of the Act by discriminatorily discharging Welch Gross, and (2) violated Section 8(a)(2) of the Act by illegally assisting District 50, United Mine Workers of America, herein called the UMW, a labor organization not in compliance with the Provisions

of Section 9(f), (g) and (h) of the Act. To effectuate the finding of discrimination, the Board ordered the Respondent to reinstate Gross, upon application, to his former or substantially equivalent position. To remedy the effect of the illegal assistance to the UMW, the Board ordered the Respondent to cease giving effect to its contract with the UMW and to withdraw and withhold recognition from the UMW unless and until the UMW shall have been certified by the Board as the exclusive bargaining representative of the Respondent's employees.

On April 29, 1955, the Respondent filed with the Board a Motion for Reconsideration of the Board's Decision and Order. In its Motion, the Respondent urged that Welch Gross be denied reinstatement because of his par-
731 ticipation in certain alleged misconduct during the course of a strike against the Respondent. On May 11, 1955, the UMW filed an Application to Modify Board Order and Supporting Argument, in which it requested that the Board amend its Order by striking therefrom paragraphs 1(c), 1(d), and 2(c), said paragraphs relating to the direction that the Respondent cease giving effect to its contract with the UMW and that the respondent withdraw and withhold all recognition from the UMW unless and until said labor organization has been certified by the Board. For the reasons set forth below, the Respondent's Motion for Reconsideration and the UMW's Application to Modify Board Order are denied.

A. *Respondent's Motion for Reconsideration.* The Respondent contends in its Motion that Gross participated in picket line misconduct which disqualified him for reinstatement, and further, that Gross should be denied reinstatement because he engaged in an unlawful secondary boycott of Respondent's customers. Similar contentions were made by the Respondent in its exceptions to the Intermediate Report and supporting brief.

The Board, having duly considered the Respondent's Motion for Reconsideration of its decision ordering Gross' reinstatement, the Motion is denied on the ground that it raises no issues not previously considered by the Board.

B. *UMW's Application to Modify Board Order.* In its Application, the UMW urges that the Board's remedial Order, directing the Respondent to cease and desist from

recognizing the UMW unless and until it was certified, is unlawful because the Board has no power under the Act to require that a labor organization participate in a Board election before it may represent an employer's em-
732 ployees, and because the Order penalizes the UMW for its noncompliance with Section 9(f), (g) and (h) of the Act.

The UMW, although duly apprised that the General Counsel alleged in his complaint that it had been unlawfully assisted by the Respondent, did not file exceptions to the trial Examiner's finding of such assistance or to his recommendation that the Respondent withdraw and withhold recognition from the UMW unless and until it obtained a Board certification. Under the circumstances, we conclude that the Application to Modify Board Order raises issues which should have been urged as exceptions to the Intermediate Report and that its filing is therefore untimely.[1]

However, aside from the Application's untimeliness, we are persuaded that the contentions raised in the UMW's moving papers lack merit. With respect to the Board's power to issue the type of order here under attack, Section 10(c) of the Act authorizes the Board, when it finds that an unfair labor practice has been committed, "to cause to be served on such person [committing the unfair labor practice] an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action . . . as will effectuate the policies of the Act." Pursuant to this Congressional mandate, the Board has, since its earliest days, recognized that the policies of the Act could best be effectuated in cases involving violations of Section 8(a)(2) by directing the offending employers to withhold the preferred treatment afforded to the labor organizations involved until the effect of the unfair labor practices had been dissipated and the majority
733 status of such unions had been established in an atmosphere free of restraint and coercion.

In the case of a dominated labor organization, the Board normally orders the complete disestablishment of such

[1] Section 102.46 of Board Rules and Regulations provides that any party to a complaint proceeding may, within 20 days from the date of service of the order transferring the case to the Board, file with the Board exceptions to the Trial Examiner's Intermediate Report and Recommended Order.

organization with the result that a dominated union can never be certified by the Board.[2] Such orders have successfully withstood challenge before the Supreme Court which has approved their issuance on the ground that they constituted a valid exercise of the Board's remedial powers under Section 10(c) of the Act.[3] However, in the case of an assisted but undominated labor organization, the Board has required the offending employer to withdraw and withhold recognition from the assisted union until it was certified, thus enabling the Board to assure the affected employees that their statutory right to freely choose a bargaining representative shall be preserved by conducting an election under conditions which will render such a choice possible.

It would seem clear, on the basis of the foregoing, that if this Board possesses the power under Section 10(c) of the Act to dissipate the effect of an unfair labor practice by *completely removing* a dominated union as bargaining representative of the offending employer's employees, as the Supreme Court has held, the Board manifestly has the statutory power to impose the lesser sanction of certification in the case of an assisted union in order to effectuate the policies of the Act.

In its Decision and Order, the Board concluded that the Respondent had unlawfully accorded the UMW the status of exclusive bargaining representative for its employees.
734 The right to such an exclusive status derives solely from the Act which we administer.[4] To remedy the unfair labor practice here committed, the Board is under a statutory duty to insure that that status is acquired free from any assistance by the Respondent. Section 9(c) of the Act, embodying the election procedures established by Congress for determining the exclusive majority representation rights of labor organizations, affords the channel

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[2] See *The Carpenter Steel Company*, 76 NLRB 670, 671; *Matter of Pennsylvania Greyhound Lines, Inc.*, 1 NLRB 1, enf'd 303 U. S. 261.

[3] See *N. L. R. B.* v. *Pennsylvania Greyhound Lines, Inc.*, note 2 *supra*; *N. L. R. B.* v. *Newport News Shipbuilding & Drydock Co.*, 308 U. S. 241.

[4] See *National Maritime Union of America* v. *Herzog*, 78 F. Supp. 146, 156 (D. C. D. C.), aff'd per curiam 334 U. S. 854:

> "That extraordinary privilege [of exclusive representative status] is extended by statute and except for the Act employers are not under compulsion to bargain collectively."

through which that remedy can be effected. By its Order, the Board is merely directing that the UMW, like any other assisted union, demonstrate that its right to be the exclusive representative of the employees involved has been established in an atmosphere free of restraint and coercion.

The UMW also contends in its Application to Modify Board Order that the Order operates to penalize the UMW because of its noncompliance with the provisions of Section 9(f), (g) and (h) of the Act. Apparently inherent in this contention is the argument that, as the UMW did not invoke the Board's processes in these proceedings, the Board is compounding the sanctions of those provisions by involving the UMW in these cases and requiring certification as a condition of achieving representative status, a condition which it cannot fulfill unless it comes into compliance.

Any "penalty" which the UMW conceives has been imposed upon it because of its inability to achieve certification stems, not from any action by this Board, but from the UMW's wilful refusal to comply with the provisions of Section 9(f), (g) and (h). Congress imported those provisions into the Act, which require that labor
735 organizations and their officers file various financial and organizational reports and non-Communist affidavits, because it believed that "the public, and particularly the employees in a bargaining unit called on to ballot concerning the choice of a bargaining agent, have a substantial interest in knowing pertinent facts concerning the organization which seeks the statutory privilege of being the exclusive bargaining representative."[5] The UMW has chosen not to make those "pertinent facts" public, but nevertheless desires the exclusive representation rights at the Respondent's terminals. In answer to a similar contention raised in *National Maritime Union of America* v. *Herzog*,[6] the Court stated:

> The argument of the plaintiff [union], which we have summarized above, concedes that Congress had the right to require the reports called for by Section 9(f) but asserts that it had no right to withhold from

[5] *Ibid.*, at p. 155.

[6] *Ibid.*, at p. 158.

a union which refused to file them, the privilege conferred by the same statute of being chosen as exclusive bargaining agent. The 'results that flow' from so doing will be virtual destruction of the union, plaintiff says. Those results flow, not from the operation of the statute, but from the plaintiff's willful refusal to furnish information which they admit is constitutionally required. If the plaintiff Union suffers the loss of a chance to be chosen as exclusive bargaining agent because of its failure to file the reports exacted by Section 9(f), the injury is the result of its own choice in deciding not to file the statements which it admits are constitutionally required.

In sum, the UMW is here suggesting that the Board do for the UMW what it would not do for a complying union found to have been illegally assisted. The very nature
736 of the 8(a)(2) violation imports into the Board processes the labor organizations which are so assisted; and the orders of the Board, directed as they are against offending employers, necessarily involve those labor organizations. Where a noncomplying union happens to be the assisted union in such proceeding, there appears to be no justifiable reason for extending preferred treatment to it over complying labor organizations by eliminating the certification requirement in the Board's orders. To do so would negative the policy and intent of Section 9(f), (g) and (h) of the Act.

ORDER

IT IS HEREBY ORDERED that the Respondent's Motion for Reconsideration be, and it hereby is, denied.

IT IS HEREBY FURTHER ORDERED that the Application for Modification of Board Order filed by the United Mine Workers of America be, and it hereby is, denied.

Dated, Washington, D. C., August 17, 1955.

GUY FARMER, Chairman
ABE MURDOCK, Member
IVAR H. PETERSON, Member
PHILIP RAY RODGERS, Member
BOYD LEEDOM, Member
NATIONAL LABOR RELATIONS BOARD

(SEAL)

739 (File Endorsement Omitted)

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 12,887

DISTRICT 50, UNITED MINE WORKERS OF AMERICA, *Petitioner*,

v.

NATIONAL LABOR RELATIONS BOARD, *Respondent*.

Petition for Review of Order of
National Labor Relations Board

No. 12,950

NATIONAL LABOR RELATIONS BOARD, *Petitioner*,

v.

BOWMAN TRANSPORTATION, INC., *Respondent*.

Petition for Enforcement of an Order of the
National Labor Relations Board

Mr. E. Crampton Harris, with whom *Messrs. Yelverton Cowherd* and *Alfred D. Treherne* were on the brief, for petitioner in No. 12,887.

Mr. Frederick U. Reel, Attorney, National Labor Relations Board, of the bar of the Supreme Court of Wisconsin, *pro hac vice*, by special leave of Court, with whom *Messrs. Theophil C. Kaminholz*, General Counsel, National Labor Relations Board, *David P. Findling*, Associate General Counsel, National Labor Relations
740 Board, and *Marcel Mallet-Prevost*, Assistant General Counsel, National Labor Relations Board, and *Mrs. Nancy M. Sherman*, Attorney, National Labor Relations Board, were on the brief, for respondent in No. 12,887 and petitioner in No. 12,950. *Mr. Robert G. Johnson*, Attorney, National Labor Relations Board, also entered an appearance for respondent in No. 12,887 and petitioner in No. 12950.

No appearance for respondent in No. 12,950.

OPINION — OCTOBER 4, 1956

Before PRETTYMAN, WILBUR K. MILLER and WASHINGTON, Circuit Judges.

WILBUR K. MILLER, *Circuit Judge:* The National Labor Relations Board petitions for enforcement of its order which requires Bowman Transportation, Inc., an interstate trucking company, to cease and desist from certain unfair labor practices, and to redress them by taking the prescribed affirmative action. Bowman Transportation has not complained of the order and did not appear here. But District 50, United Mine Workers of America, which had been chosen by the Bowman employees as their exclusive bargaining representative but has not been certified as such by the Board, petitions us to review and set aside three paragraphs of the order by which it feels aggrieved.

The background of the Labor Board's order and its essential features may be quickly sketched. In November, 1953, the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, AFL, Local No. 612, undertook to organize Bowman's employees and established a picket line at its main terminal in Gadsden, Alabama. The Teamsters' efforts, opposed by the company, were unsuccessful but were still in progress, at least to the extent of the picketing which a state court first enjoined but later permitted, with violence and disorder forbidden, when another labor organization appeared on the scene in May, 1954.

741 The president of Bowman called a meeting of all employees for May 22, after having been told by some employees they wanted a contract, and after having conferred with organizers for District 50. The meeting was largely attended. Those present voted unanimously to be represented by District 50 and most of them signed authorization cards, whereupon Bowman recognized that union as the bargaining representative and entered into a contract with it.

Because of these events, the General Counsel of the Labor Board charged Bowman with several unfair labor practices. After a hearing the Board found: (1) that Bowman discriminatorily discharged driver Gross and

removed driver Lackey from his regular run because of their activities in behalf of Teamsters, thereby discouraging membership in that union, an unfair labor practice within the meaning of § 8(a)(3) of the Act; (2) that Bowman interfered with the administration of District 50 and contributed support to it and so engaged in unfair labor practices within the meaning of § 8(a)(2) of the Act; and (3) that Bowman interfered with, restrained and coerced its employees in the exercise of the rights guaranteed in § 7 of the Act, and thereby engaged in unfair labor practices within the meaning of § 8(a)(1) of the Act.

Upon these findings, the Board ordered Bowman to cease and desist from: 1(a) the unfair labor practices found by it; 1(b) interfering with, restraining or coercing its employees in the exercise of their statutory rights; and from

> "[1](c) Giving effect to the collective bargaining agreement, dated May 22, 1954, between the Respondent and District 50, United Mine Workers of America, or to any extension, renewal or modification thereof, or any other contract agreement between the Respondent and the said labor organization which may now be in force;
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> 742 "[1](d) Recognizing District 50, United Mine Workers of America, as the representative of its employees for the purpose of dealing with the Respondent concerning grievances, labor disputes, wages, rates of pay, hours of employment, or other conditions of employment, unless and until the said labor organization shall have been certified as such representative by the Board."

The portion of the order requiring affirmative action directed Bowman to offer reparations to drivers Gross and Lackey, and to

> [2](c) Withdraw and withhold all recognition from District 50, United Mine Workers of America, as representative of its employees for the purpose of dealing with the Respondent concerning grievances, labor disputes, wages, rates of pay, hours of em-

ployment, or other conditions of employment, unless and until the said labor organization shall have been certified as such representative by the Board."

The order also required Bowman to post prescribed notices.

May 11, 1955, before enforcement of the order had been sought, District 50, which had not theretofore been a party to the proceeding, filed with the Board an application to modify the order by striking therefrom paragraphs 1(c), 1(d) and 2(c), which we have reproduced above. The application was denied by the Board.

Part of the Background of the Board's order is the fact that the Teamsters union had theretofore filed the information and affidavits described in § 9(f), (g) and (h) of the Labor Management Relations Act, 1947, while United Mine Workers of America, the parent union of District 50, has not filed thereunder. Teamsters was and is therefore eligible to be certified as the bargaining representative of Bowman's employees if it were chosen by them, but District 50, though chosen, may not be certified so long as its parent is in a state of non-compliance

734 That Bowman had engaged in the unfair labor practices found by the Board clearly appears from the evidence. It was appropriate to order, as the Board did, that the employer correct its discriminatory treatment of drivers Gross and Lackey, and that it cease and desist from giving effect to its contract with District 50, which was unfairly arrived at through Bowman's illegal assistance to that union. In those respects the order should be enforced.

This leaves for consideration paragraphs 1(d) and 2(c) of the order which direct Bowman to cease and desist from recognizing District 50 as the bargaining representative, and to withdraw and withhold such recognition, "unless and until the said labor organization shall have been certified as such representative by the Board." District 50's attack on these portions of the order raises the question whether the Labor Board has authority to forbid an employer to recognize or contract with a labor organization chosen by its employees as their exclusive

bargaining representative so long as the union remains uncertified as such.

We hold the Board does not have such authority. In *United Mine Workers of America* v. *Arkansas Oak Flooring Co.*, 351 U. S. 62, 71-2 (1956), the Supreme Court observed that there is no statutory provision to the effect that a non-complying union "may not represent an appropriate unit of employees if a majority of those employees give it authirity so to do." The Court went on to say:

> ". . . Likewise, there is no statement precluding their employer from voluntarily recognizing such a noncomplying union as their bargaining representative. Section 8(a)(5) declares it to be an unfair labor practice for an employer 'to refuse to bargain collectively with the representatives of his employees, *subject to the provisions of section 9(a).*' (Emphasis supplied.) Section 9(a), which deals expressly with employee representation, says nothing as to how the
> 744 employees' representative shall be chosen. See *Lebanon Steel Foundry* v. *Labor Board*, 76 U. S. App. D. C. 100, 103, 130 F. 2d 404, 407. It does not make it a condition that the representative shall have complied with § 9(f), (g) or (h), or shall be certified by the Board, or even be eligible for such certification."

In footnote 8, 351 U. S. at 72, the Court noted that "A Board election is not the only method by which an employer may satisfy itself as to the union's majority status."

In a recent case somewhat similar to this one,[1] Chief Judge Parker of the Fourth Circuit discussed the *Oak Flooring* opinion and said:

> ". . . If a cease and desist order were proper under the circumstances of the case, it should have been couched in language which would not have precluded representation of the employees by District 50 if chosen by a majority to represent them after

[1] *District 50, United Mine Workers of America* v. *National Labor Relations Board and Pittsburgh Valve Co.* v. *National Labor Relations Board*, 234 F. (2d) 565, 571 (4th Cir. 1956).

all effects of any unfair labor practice had been eliminated."

We adopt the language just quoted as applicable to this case. Paragraphs 1(d) and 2(c) are therefore improper and should not be enforced in their present form, since they preclude District 50 from representing the employees in the future, even though hereafter they should choose it in an atmosphere and a situation entirely free from the influence of unfair labor practices. There should be added, at the end of each of those paragraphs, the words "or shall have been freely chosen as such by a majority of the employees after all effects of unfair labor practices have been eliminated."

745 With paragraphs 1(d) and 2(c) amended in the manner indicated above, and with the slight changes in the notice to be posted by the company which will hereinafter be suggested, we think the order will achieve the Board's proper objective, which is to eliminate the effects of Bowman's unfair labor practices so as to place Teamsters, District 50, employer and employees *in statu quo ante*, and to forbid and guard against future unfair practices by the employer, so that thereafter the employees and any and all unions concerned may work out the representation problem, untrammeled by any outside influence. When this objective has been reached, and if the employees then want a bargaining representative, they will be in a position to choose one in any manner which clearly indicates their desire. They may select non-complying District 50, or complying Teamsters, or any other complying or non-complying union, and the employer must recognize their choice. The only limitation is that, if the Board conducts an election, District 50 will not be on the ballot. Amended in the manner we have indicated, the order will be enforced.

There still remains, however, the necessity of deciding when the ill effects of Bowman's past practices have been removed. Certainly, one effect of Bowman's unfair labor practices is removed by requiring the offer of reparation to the two drivers. Another is eliminated by striking down the present contract, unfairly arrived at, between Bowman and District 50. The possibility of

continuing effect is guarded against by ordering Bowman (1) to cease and desist from the labor practices found to be unfair; (2) to refrain in the future from engaging in those or any other unfair practices; and (3) to post notices for 60 days that, in obedience to the Board's order, it will make the required amends and will not in the future interfere in any way with the organizational efforts of any union, or with the employees' exercise of the rights guaranteed to them by law.

746 We think that, 60 days after the notices have been posted, it may reasonably and safely be assumed that normalcy has been restored by the Board's corrective order. Thereafter, if a Board election should be required and if the employees should therein select Teamsters or some other complying union as bargaining representative, the matter would be at an end. But, if in an election the employees should reject any and all candidates, or if no election is held, and if the employees should designate District 50 as their choice, that union will become the bargaining representative.

The form of notice to be posted by the company should be modified so as not to be inconsistent with this opinion. Moreover, the notice should not indicate that the Board prefers Teamsters. We suggest that references to that union in the Board's form of notice are susceptible of being construed as so indicating, and might better be omitted so that the company's pledges of non-interference will apply to all labor organizations. We attach as an appendix what we regard as a proper notice.

The order under review will be amended in the manner set forth in the foregoing opinion. As so amended, the order will be enforced.

APPENDIX

NOTICE TO ALL EMPLOYEES

PURSUANT TO A DECREE

of the Unted States Court of Appeals for the District of Columbia Circuit, enforcing an order of the National Labor Relations Board, and in order to effectuate the policies of the National Labor Relations Act, as amended, we hereby notify our employees that:

747 WE WILL NOT discourage membership in any labor organization of our employees, by discharging or refusing to reinstate any of our employees, or in any other manner discriminating in regard to their hire or tenure of employment, or any term or condition thereof, because of their activity in behalf of or membership in such labor organization.

WE WILL offer to Welch Gross, upon his application, immediate and full reinstatement in his former position or in one substantially equivalent, without prejudice to any seniority or other rights and privileges he previously had, with back pay from the date of his discharge to the date of his reinstatement.

WE WILL offer assignments to Joe Lackey, upon his re-employment, the equivalent to those he had before he was removed from his regular run.

WE WILL NOT interrogate our employees concerning their activities in behalf of any labor organization in a manner which constitutes interference, restraint or coercion in violation of § 8(a)(1) of the Act, and we will not engage in surveillance of our employees at labor organization meetings.

WE WILL NOT interfere with the formation or administration of any labor organization or contribute financial or other support to any such organization.

WE WILL NOT give effect to our agreement, dated May 22, 1954, with District 50, United Mine Workers of America, or to any other contract or agreement with District 50 which may now be in force, since the National Labor Relations Board has

held that the contract was brought about through unfair labor practices.

WE WILL NOT recognize District 50 as the bargaining representative of our employees, unless and until it shall have been certified as such representa-
748 tive by the National Labor Relations Board, or shall have been selected as such by a majority of our employees at a time at least 60 days later than the date of this notice.

All our employees are free to become, remain, or refrain from becoming, members of any labor organization, except to the extent that this right may be affected by agreements made in conformity with § 8(a)(3) of the National Labor Relations Act, as amended.

BOWMAN TRANSPORTATION, INC.
(Employer)

Dated ..... By .....
(Title)

This notice must remain posted for 60 days from the date hereof, and must not be altered, defaced, or covered by any other material.

WASHINGTON, *Circuit Judge*, dissenting: I am constrained to disagree with the court's action in modifying the Board's order.

1. Section 10(c) of the Labor Management Relations Act of 1947, 29 U.S.C. § 160(c) (1952), authorizes the Board, when it finds that an unfair labor practice has been committed, to "cause to be served on such person [committing the unfair labor practice] an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action . . . as will effectuate the policies of this subchapter."[1] These policies include, among others, the elimination of unfair labor practices by employers and unions, and the protection of the employees' right to designate a bargaining

[1] The subchapter referred to is that titled "National Labor Relations," which deals generally with the Labor Board, its powers, procedures, and jurisdiction.

749 representative of their own choosing, as expressed in Section 9(a) of the Act.

It seems quite clear that a provision prohibiting an employer from recognizing a union unfairly controlled or supported by the employer until that union has been certified as the bargaining agent of the employees would in many cases be an important factor in purging unfair labor practices. In remedying such practices the Board has long inserted a provision of that sort in its orders. Even stronger action has sometimes been taken by the Board, and the Supreme Court has supported it. For example, employer-dominated unions have on occasion been ordered completely disestablished, with Supreme Court approval. *National Labor Relations Board* v. *Falk Corp.*, 308 U.S. 453 (1940); *H. J. Heinz Co.* v. *National Labor Relations Board*, 311 U.S. 514 (1941); *Labor Board* v. *Link-Belt Co.*, 311 U.S. 584 (1941). And in a case where the employer had assisted union A, the Board ordered him to deal exclusively with union B (a rival), even though before the order was issued the Board had been advised that a majority of the employees wished to be represented by the assisted union. The order was upheld. *International Association of Machinists* v. *Labor Board*, 311 U.S. 72 (1940). In view of these precedents, the Board may surely take a less stringent course, and in an appropriate case order non-recognition by the employer of the assisted union as long as it remains uncertified. As to unions complying with the filing provisions of the Act, that conclusion would seem beyond question. As Chief Judge Parker said in *District 50, United Mine Workers* v. *National Labor Relations Board*, 234 F.2d 565 (4th Cir. 1956):

> "... the form of order here entered [similar to that in the instant case] would be appropriate if applied to a union which had complied with the filing provisions of the Labor Management Relations Act ...."

750 The question here, of course, is whether the fact that a union has not complied with the filing provisions of the Act, and refuses to comply, entitles it to special treatment by the Board. The Ninth Circuit has answered

this question in the negative.[2] Yet the decision of the majority here, and of the Fourth Circuit in the *District 50* case, is to the contrary. The holding is—in substance and effect—that the Board cannot as a matter of law apply to a union which has not complied with the filing provisions of the law, the very condition which it could rightfully apply to a complying union. I find no basis in principle for giving a non-complying union an advantage which complying unions do not have. In practice to do so may encourage unions not to comply with the Act.

Mine Workers v. *Arkansas Oak Flooring Co.*, 351 U.S. 62 (1956), relied on by the majority, simply holds that noncompliance by a union with Section 9(f),(g), and (h) of the Act does not open the door to the state courts to take action against the union that they would not otherwise be able to take. As I read that decision, it was intended to preserve and protect the authority of the National Labor Relations Board, not to undermine and weaken it. It can hardly be interpreted as holding that noncompliance by a union prevents the National Labor Relations Board from taking action which it is authorized to take against a *complying* union, and which the Act itself permits. It is true that the Supreme Court's opinion declares that "no consequences other than those so
751 listed [in the Act] shall result from noncompliance."
351 U.S. at 73. But the context of this statement indicates that the Court was referring to consequences apart from those sanctioned by the Act itself. "Elimination of the Board [as a forum of resort by any union not complying with the filing provisions of the Act] does not, however, eliminate the applicability of the National Labor Relations Act, as amended . . . ." *Id.* at 74.

2. The principle is now well established that the Board, and not the courts, is primarily charged with the responsibility of determining what provisions are best included in Board orders to carry out the policies of the Act. "The particular means by which the effects of unfair

[2] See National Labor Relations Board v. Wemyss, 212 F.2d 465 (9th Cir. 1954), where the assisted union had not complied with Section 9(f), (g), or (h) (see p. 470), and where the court held that the assistance given warranted issuance of "an order that the employer withdraw recognition from the favored organization unless and until it is certified by the Board after a fair election." (p. 472)

labor practices are to be expunged are matters 'for the Board not the courts to determine' . . . We give considerable weight to that administrative determination. It should stand unless it can be shown that the order is a patent attempt to achieve ends other than those which can fairly be said to effectuate the policies of the Act." *Virginia Electric Co.* v. *Labor Board*, 319 U.S. 533, 539-40 (1943), citing *International Association of Machinists* v. *Labor Board*, 311 U.S. 72 at 82 (1940); *Labor Board* v. *Link-Belt Co.*, 311 U.S. 584 at 600 (1941). The majority has not suggested that the Board's order does not effectuate the policies of the Act or that it was not intended to do so. Nor, as I view the case, could such a conclusion fairly be reached.

Concededly, if District 50 or its parent organization persists in refusing to file the required statements and affidavits, the Board's order will effectually preclude the employer from recognizing and contracting with District 50 as the employees' bargaining agent, even though the employees continue to favor it. But this restraint on the employees' freedom of choice is in part due to the attitude of the union, which has chosen not to comply with Section 9. Furthermore, if the Board properly concludes

752 that certification of the union in the normal way is necessary to dissipate the effect of the unfair labor practices, the order would tend to assure—rather than deny—the freedom of choice guaranteed by the Act by removing improper restraints on the employees. See *International Association of Machinists* v. *Labor Board*, 311 U.S. at 82; *H. J. Heinz Co.* v. *Labor Board*, 311 U.S. at 522.

The Board stated here that the disputed provision of its order was included "To remedy the effect of the illegal assistance to the UMW," and further that:

> "By its Order, the Board is merely directing that the UMW, like any other assisted union, demonstrate that its right to be the exclusive representative of the employees involved has been established in an atmosphere free of restraint and coercion."

And with regard to its previous practice the Board stated:

> "However, in the case of an assisted but undominated labor organization, the Board has required the offending employer to withdraw and withhold recognition from the assisted union until it was certified, thus enabling the Board to assure the affected employees that their statutory right to freely choose a bargaining representative shall be preserved by conducting an election under conditions which will render such a choice possible."

It is true that the Board did not expressly consider any alternative remedies—such as conducting an investigation at a later time to determine whether the effects of the unfair labor practices had by then been dissipated. But District 50 suggested no such alternative: it simply argued to the Board that the order was beyond the Board's power. When this argument was rejected, it appealed to this court on the same ground. As I have indicated, I think that ground is clearly untenable: in a proper case, the Board has power to enter an order of the present sort. And I think that this is such a case,
and that the Board's findings were adequate to sup-
753 port its action—especially since it was never asked to consider any other type of action. But if this be doubted, *cf. Siegel Co.* v. *Federal Trade Commission*, 327 U.S. 608 (1946), the proper course for this court is to remand the case to the Board for further consideration. Certainly it is not within our province for us to rewrite the Board's order to choose a different remedy than it has chosen, and to direct that our new order be enforced. See *National Labor Relations Board* v. *Falk Corp.*, 308 U.S. 453 (1940); *Federal Power Commission* v. *Idaho Power Co.*, 344 U.S. 17, 20 (1952).

755 (File Endorsement Omitted)

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

OCTOBER TERM, 1956

No. 12,887

DISTRICT 50, UNITED MINE WORKERS OF AMERICA, *Petitioner*,

v.

NATIONAL LABOR RELATIONS BOARD, *Respondent*.

No. 12,950

NATIONAL LABOR RELATIONS BOARD, *Petitioner*,

v.

BOWMAN TRANSPORTATION, INC., *Respondent*.

On Petition for Review and on Petition for Enforcement of an Order of the National Labor Relations Board.

Before Prettyman, Wilbur K. Miller and Washington, Circuit Judges.

Order and Decree—Filed October 4, 1956

These cases came on to be heard on the record from the National Labor Relations Board and on a petition for review and a petition for enforcement of the order of the National Labor Relations Board herein, and were argued by counsel.

On consideration whereof, it is ORDERED and DECREED by the Court that the order of the Board on review herein be, and the same is hereby, modified as indicated in the opinion of this Court and, as so modified, will be enforced.

It is, therefore, ORDERED by the Court that the National Labor Relations Board shall within 10 days serve and file a proposed enforcement decree and form of notice conforming with the views set forth in the opinion of this Court.

The provisions of paragraph (e) of Rule 38 of this Court shall apply thereto.

Dated: October 4, 1956.

Per Circuit Judge Wilbur K. Miller.

Separate dissenting opinion by Circuit Judge Washington.

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756 (File Endorsement Omitted)

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 12,887

DISTRICT 50, UNITED MINE WORKERS OF AMERICA, *Petitioner*,

v.

NATIONAL LABOR RELATIONS BOARD, *Respondent*.

No. 12,950

NATIONAL LABOR RELATIONS BOARD, *Petitioner*,

v.

BOWMAN TRANSPORTATION, INC., *Respondent*.

Decree Enforcing as Amended an Order of the National Labor Relations Board—Filed November 1, 1956

Before Prettyman, Wilbur K. Miller and Washington, Circuit Judges.

This cause came on to be heard upon the petition of District 50, United Mine Workers of America to review part of an order of the National Labor Relations Board dated April 22, 1955, and upon the petition of the National Labor Relations Board filed against Bowman Transportation, Inc. for enforcement of the order. The Court heard argument of respective counsel on April 9, 1956, and has considered the briefs and the transcript of record filed in this cause. On October 4, 1956, the Court, being fully advised in the premises, handed down its decision amending,

and as amended, enforcing the order of the Board. In conformity therewith, it is hereby

ORDERED, ADJUDGED AND DECREED by the Court that Bowman Transportation, Inc.; Gadsden, Alabama, its officers, agents, successors, and assigns, (hereinafter called the Company), shall:

1. Cease and desist from:

(a) Discouraging membership in International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, AFL, Local No. 612, or any other labor organization of its employees, by discharging or refusing to reinstate any of its employees or by discriminating in any other manner in regard to their hire or tenure of employment, or any term or condition of their employment.

757

(b) Assisting in the administration of District 50, United Mine Workers of America, or contributing support to it, or to any other labor organization.

(c) Giving effect to the collective bargaining agreement, dated May 22, 1954, between the Company and District 50, United Mine Workers of America, or to any extension, renewal, or modification thereof, or any other contract agreement between the Company and the said labor organization which may now be in force.

(d) Recognizing District 50, United Mine Workers of America, as the representative of its employees for the purpose of dealing with the Company concerning grievances, labor disputes, wages, rates of pay, hours of employment, or other conditions of employment, unless and until the said labor organization shall have been certified as such representative by the National Labor Relations Board or shall have been freely chosen as such by a majority of the employees after all effects of unfair labor practices have been eliminated.

(e) Interrogating its employees concerning their activities on behalf of International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, AFL, Local No. 612, or any other labor organization, in a manner constituting interference, restraint, or coercion in

violation of Section 8 (a) (1), of the National Labor Relations Act, as amended (hereinafter called the Act), and from engaging in the surveillance of its employees at such meetings.

(f) In any other manner interfering with, restraining, or coercing its employees in the exercise of the right to self-organization, to form labor organizations, to join or assist the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, AFL, 758 Local 612, or any other labor organization, to bargain collectively through representatives of their own choosing, and to engage in concerted activities for the purpose of collective bargaining or other mutual aid or protection, or to refrain from any or all of such activities, except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment, as authorized in Section 8 (a) (3) of the Act.

2. Take the following affirmative action, which the Board has found will effectuate the policies of the Act:

(a) Offer to Welch Gross, upon his application, immediate and full reinstatement to his former or substantially equivalent position, without prejudice to his seniority or other rights and privileges, and make him whole for any loss of pay he may have suffered by reason of the Company's discrimination against him, in the manner set forth in the section of the Intermediate Report of the Trial Examiner of the National Labor Relations Board dated November 26, 1954, entitled "The Remedy."

(b) Offer assignments to Joe Lackey, upon his reemployment, without discrimination because of that employee's union or concerted activities.

(c) Withdraw and withhold all recognition from District 50, United Mine Workers of America, as representative of its employees for the purpose of dealing with the Company concerning grievances, labor disputes, wages, rates of pay, hours of employment, or other conditions of employment unless and until the said labor organization shall have been certified as such representative by the Board or shall have been freely chosen as such by a majority of

the employees after all effects of unfair labor practices have been eliminated.

(d) Post at all its terminals copies of the notice attached hereto and marked "Appendix A." Copies of said notice, to be furnished by the Regional Director for the Tenth Region of the National Labor Relations Board, Atlanta, Georgia, shall after being duly signed by the Company, be posted by it immediately upon receipt thereof, and
759 maintained by it for sixty (60) consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Company to insure that said notices are not altered, defaced, or covered by any other material.

(e) Notify the aforesaid Regional Director, in writing, within ten (10) days from the date of this Decree, what steps the Company has taken to comply herewith.

/s/ E. Barrett Prettyman
Judge, United States Court of Appeals
for the District of Columbia Circuit

/s/ Wilbur K. Miller
Judge, United States Court of Appeals
for the District of Columbia Circuit

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Judge, United States Court of Appeals
for the District of Columbia Circuit

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760 APPENDIX

NOTICE TO ALL EMPLOYEES

PURSUANT TO
A DECREE

of the United States Court of Appeals for the District of Columbia Circuit, enforcing an order of the National Labor Relations Board, and in order to effectuate the policies of the National Labor Relations Act, as amended, we hereby notify our employees that:

WE WILL NOT discourage membership in any labor organization of our employees, by discharging or refusing to reinstate any of our employees, or in any other manner discriminating in regard to their hire or tenure of employment, or any term or condition thereof, because of their activity in behalf of or membership in such labor organization.

WE WILL offer to Welch Gross, upon his application, immediate and full reinstatement in his former position or in one substantially equivalent, without prejudice to any seniority or other rights and privileges he previously had, with back pay from the date of his discharge to the date of his reinstatement.

WE WILL offer assignments to Joe Lackey, upon his re-employment, the equivalent to those he had before he was removed from his regular run.

WE WILL NOT interrogate our employees concerning their activities in behalf of any labor organization in a manner which constitutes interference, restraint or coercion in violation of Section 8 (a) (1) of the Act, and we will not engage in surveillance of our employees at labor organization meetings.

WE WILL NOT interfere with the formation or administration of any labor organization or contribute financial or other support to any such organization.

WE WILL NOT give effect to our agreement, dated May 22, 1954, with District 50, United Mine Workers of America, or to any other contract or agreement with District 50 which may now be in force, since the National Labor Relations Board has held that the contract was brought about through unfair labor practices.

WE WILL NOT recognize District 50 as the bargaining representative of our employees, unless and until it shall have been certified as such representative by the National Labor Relations Board, or shall have been selected as such by a majority of our employees at a time at least 60 days later than the date of this notice.

All our employees are free to become, remain, or refrain from becoming, members of any labor organization, except

to that extent that this right may be affected by agreements made in conformity with Section 8 (a) (3) of the National Labor Relations Act, as amended.

BOWMAN TRANSPORTATION, INC.
(Employer)

Dated ..... By .....
(Title)

This notice must remain posted for 60 days from the date hereof, and must not be altered, defaced, or covered by any other material.

762 (File Endorsement Omitted)

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

(Title Omitted)

Stipulation—Filed December 12, 1955

It is hereby stipulated by and between the parties that Question "c" in the Stipulation dated November 14, 1955, heretofore filed in this case is not presented in this proceeding, and said previous stipulation is hereby amended to delete that question.

/s/ MAURICE F. BISHOP
Counsel for
Bowman Transportation, Inc.

Dated at Birmingham, Ala.
this 7th day of December, 1955

/s/ E. CRAMPTON HARRIS
Counsel for District 50
United Mine Workers of America

Dated at Washington, D. C.
this 8th day of December, 1955.

/s/ MARCEL MALLET-PREVOST
Marcel Mallet-Prevost
Assistant General Counsel
NATIONAL LABOR RELATIONS BOARD

Dated at Washington, D. C.
this 5 day of December, 1955.

763 (File Endorsement Omitted)

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

OCTOBER TERM, 1955

(Title Omitted)

Before: Prettyman, Circuit Judge, In Chambers.

Order Amending Stipulation—Filed December 13, 1955

Upon consideration of the stipulation by all parties to the above cases that the stipulation dated November 14, 1955 and approved by me on November 29, 1955, be amended by deleting therefrom question "c", it is

ORDERED that the question "c" be stricken from the stipulation filed herein November 29, 1955.

Dated: December 13, 1955

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767 SUPREME COURT OF THE UNITED STATES

No. 672, October Term, 1956

NATIONAL LABOR RELATIONS BOARD, *Petitioner*,

v.

DISTRICT 50, UNITED MINE WORKERS OF AMERICA AND BOWMAN TRANSPORTATION, INC.

Order Allowing Certiorari—Filed February 25, 1957

The petition herein for a writ of certiorari to the United States Court of Appeals for the District of Columbia Circuit is granted, and the case is transferred to the summary calendar.

And it is further orderd that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

☆ U. S. GOVERNMENT PRINTING OFFICE 1957—439290/P O. 397